

IN THE HIGH COURT OF JUSTICE  
OF EDO STATE OF NIGERIA  
IN THE UBIAJA JUDICIAL DIVISION  
HOLDEN AT UROMI  
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,  
JUDGE, ON WEDNESDAY THE  
28<sup>TH</sup> DAY OF MARCH, 2018.

BETWEEN:

HUB/1A/2016

MADAM MARYAM BUZUGBEí í í í í í í í í í í .APPELLANT

AND

CHIEF PIUS AMIEGBEBHORí í í í í í í í ..í í í í í í í .. (DECEASED)

MR. LAWRENCE AMIEGBEBHOR  
(Legal Representative to Defendant/  
Judgment Debtor sought to be made to  
Substitute Defendant/Judgment Debtor,  
Chief Pius Amiegbebhor)



RESPONDENT

JUDGMENT

This is an appeal against the Ruling of the Area Customary Court; Ubiaja delivered on the 4<sup>th</sup> of November 2015, dismissing the Appellant's application to substitute the Respondent, the first son of the deceased Defendant/Judgment Debtor Respondent, (Chief Pius Amiegbebhor), in place of the deceased who died immediately after the Appellant obtained judgment for the recovery of her premises.

The facts giving rise to the Ruling culminating in this Appeal is that at the lower court, the Appellant filed a Claim against the deceased seeking the following reliefs:

- i. An order for the Defendant to deliver up possession of the house at No. 42, Wire road Ubiaja, to the Plaintiff;
- ii. An order that the Defendant pays to the Plaintiff, arrears of N10, 000.00 (ten thousand naira) per month from 1<sup>st</sup> November, 2010 till January 2014 when seven (7) days notice was served on the Defendant; and
- iii. Mesne profit of N10, 000.00 (ten thousand naira) per month from February 1<sup>st</sup> 2014 till possession is given up.

The lower Court in its judgment delivered on the 8<sup>th</sup> of October 2014 granted all the reliefs. Before the Appellant could execute the judgment, the Defendant/Judgment Debtor, died and the Appellant brought the aforesaid application for substitution which was refused.

Being dissatisfied with the ruling, the Appellant filed her Notice and Grounds of Appeal which were subsequently amended with the leave of this Court, to incorporate some additional grounds of appeal.

All the Grounds of Appeal bereft of their particulars are as follows:

**GROUND 1**

*That the judgment of the trial court is unreasonable, having regard to the weight of evidence.*

**GROUND 2**

*That the trial customary court erred in law, when it held that there was no evidence in the affidavit attached to the motion dated 3<sup>rd</sup> December, 2014 and filed the same day along with the Motion paper to show that Mr. Lawrence Amiegbehor who the Plaintiff sought to substitute his late father was a son of his father, Chief Pius Amiegbehor.*

**GROUND 3**

*That the trial court misdirected itself in fact when it held that: “In material, paragraphs 2,3,5,6 and 7 are offensive of the Evidence Act, 2011 and they are accordingly struck out of the record.”*

**GROUND 4**

*The trial court erred in law when it dismissed the motion because the material facts were not placed before it even though the deponent did not file a counter affidavit.*

**GROUND 5**

*The trial court erred in law when it held that the affidavit in support of the motion was defective since the counsel: “in our view seems to be as one presenting the facts as a litigant.”*

Learned Counsel for the parties filed and exchanged their respective briefs of arguments in consonance with the rules of this Court.

In his Brief of Argument, the learned Counsel for the Appellant, J.I.Erewele Esq., identified two Issues for Determination as follows:

1. *Whether the affidavit evidence in support of motion to use Lawrence Amiegbebor to substitute his late father, Pius Amiegbebor showed that the Respondent was the 1<sup>st</sup> surviving son of his late father, Pius Amiegbebor; and*
2. *Whether a Counsel can on behalf of his Client legitimately depose to an affidavit in respect of facts which came to his knowledge by*

*hearing, seeing and discussing with the people concerned while preparing and or conducting a matter for his Client in Court.*

On his part, learned counsel for the 1<sup>st</sup> Respondent, M.A.Agbonhiebuele Esq., formulated three Issues for Determination in this appeal as follows:

1. *Whether the lower court was right when it held that paragraphs 2,5,6 and 7 of the Appellant's affidavit are completely defective in all ramifications and offend section 115(3) and (4) of the evidence Act 2011 and consequently dismissed the appellant's application since there are no facts to support same; and*
2. *Whether ground 2 of the Appellant's ground of appeal is not incompetent since it did not relate to the decision of the lower court.*

Upon a careful examination of the Respondent's Issue 2, I am of the view that the said issue should have been raised as a Preliminary Objection since it is actually challenging the competence of the ground of appeal. However, I am in complete agreement with him that the said Ground 2 did not relate to the decision of the trial court.

Going through the entire gamut of the ruling, I did not see where the court held that:

***“there was no evidence in the affidavit attached to the motion dated 3<sup>rd</sup> December, 2014 and filed the same day along with the Motion paper to show that Mr. Lawrence Amiegbebhor who the Plaintiff sought to substitute his late father was a son of his father, Chief Pius Amiegbebhor.”***

In the case of: ***O. B NIG PLC V O.B.C LTD (2005) Vol. 123 LRCN page 34 at page 63 EEJJ and 64A***, rightly relied upon by the learned counsel, the Supreme Court held as follows:

***“A ground of appeal should complain of the live issues in the matter which will determine the fortunes of the appeal one way or the other.***

***Where grounds of appeal do not properly relate to or fit into the decision of the court, they gallivant in the appeal, serving no useful purpose”.***

Consequently, I hold that the said Ground 2 is incompetent and it is accordingly struck out. Furthermore, the Issue for Determination derived there from is irrelevant and the arguments based on it cannot be considered in the appeal.

Going through the issues formulated by both counsel, I observed that each counsel appears to have formulated his issues to support his position. It is settled law that issues must be: ***“formulated within the parameters and context of the grounds of appeal”***. See the case of: ***Onyia vs. Onyia (1989) 2 SCNJ 120 at 128.***

In the interest of justice, an appellate court can *suo motu*, reformulate the issues for determination from the grounds of appeal. See the following decisions on the point: ***Akpan vs. The State (1995) 6 NWLR (Pt.248) 439 at 466; and Sha vs. Kwan (2000) 8 NWLR (Pt.670) 710-711.*** I will therefore reformulate the issues for determination in the interest of justice.

Upon a consideration of the subsisting grounds of appeal, I am of the view that the germane issues for determination in this appeal are as follows:

1. *Whether the trial court was right when it dismissed the motion because the material facts were not placed before it even though the deponent did not file a counter affidavit; and*
2. *Whether the lower court was right when it held that paragraphs 2,5,6 and 7 of the Appellant’s affidavit are completely defective in all ramifications and offend section 115(3) and (4) of the evidence Act 2011 and consequently dismissed the appellant’s application since there are no facts to support same.*

At the hearing of this appeal, the learned counsel for the parties adopted their respective briefs of argument as their arguments in this appeal.

### **ARGUMENTS ON ISSUES 1 & 2:**

Arguing Issue 1 and 2, the learned counsel for the Appellant, J.I.Erewele Esq. reproduced paragraphs 2 to 7 of the supporting affidavit as follows:

***“2. That when this summons for recovery of premises was filed in court, the late Pius Amiegbebor, his wife and some of his children were living***

*in the Plaintiff's house where the originating writ of possession and other notices were served on him in the presence of his wife and children.*

*3. That while taking the brief from the Plaintiff, the Defendant was ill and was always on bed. The Plaintiff informed me and I verily believe her to be true that Mr. Lawrence Amiegbehor was the Defendant's first son and therefore his heir apparent.*

*4. That judgment in this case was delivered on 8<sup>th</sup> October 2014 and the enrolled judgment is herewith attached and marked Exhibit "A".*

*5. That while waiting for the Defendant/Judgment Debtor to give up possession of the house and premises and pay the judgment debt, I was informed that the Defendant/Judgment Debtor had died. That I visited the house to condole the wife and children of the deceased tenant and his wife confirmed to me that the Defendant/Judgment Debtor had died and the party sought to substitute, Lawrence Amiegbehor was deceased's first son, therefore Legal representative of the late tenant.*

*6. That being the legal representative of the deceased Defendant/Judgment Debtor, Lawrence has inherited all assets and liabilities of the deceased Defendant/Judgment Debtor.*

*7. That the Defendant's wife and children have not given up possession of the house to the Plaintiff and the judgment debt remains unpaid".*

Counsel referred the Court to paragraph 3 of page 14 of the printed record where the lower court held thus:

*"we have perused the said paragraphs and while it is said that the first arm or sentence of paragraph 3 offends THE EVIDENCE ACT, the second arm sentence of the paragraph does not ..... However paragraphs 2, 5, 6 and 7 are completely defective in all ramifications and offend the provisions of THE EVIDENCE ACT since Counsel in our view seems to be the one presenting the facts as a litigant. Section 115 (3) and (4) is clear.....ö*

Learned counsel went further to reproduce *Section 115 (3) and (4) of the Evidence Act* as follows:

*"(3) When a person deposes to his belief in any matter of fact, and his believe is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.*

*(4). When such belief is derived from information received from another person, the name of his information shall be stated, and reasonable*

***particulars shall be given respecting the informant, and the time, place and circumstance of the information.”***

He contended that a careful perusal of the affidavit in support of the motion will show that the information contained in paragraph 2 were within the knowledge of J.I. Erewele Esq. who accompanied the Bailiff to the house of the Tenant.

Again, he submitted that the first arm of paragraph 3 shows that the Deponent had full knowledge of the facts of the health condition of the late Tenant hence the deposition that: ***“while taking the brief from the Plaintiff, the Defendant was ill and always on bed”***.

On paragraph 5 of the affidavit, he contended that when the Deponent heard of the demise of the Tenant, he personally visited the house where he met his wife and children mourning and there he confirmed the death of the Tenant and became aware that Lawrence Amiegbebhor was his first son.

Counsel contended that paragraphs 6 and 7 also confirmed that the Deponent knew that Lawrence Amiegbebhor was the first son of the deceased Tenant, that he had not given up possession of the house and that the judgment debt had remained unpaid. That these facts came to his knowledge in the course of his duty as a Lawyer and he did not need to state the source of his information. See the case of: ***AVIATION SERV. LTD VS THAHAL (2004) Vol. 119 LRCN 4357 R. 1***

He further submitted that a Counsel can legitimately swear to an affidavit in respect of facts that came to his knowledge while conducting a case for his client. He maintained that where a fact was deposed to by a party to a suit, his adversary has a duty to controvert those facts in a counter affidavit and failure to controvert same, he is deemed to have admitted the facts deposed to in the affidavit and the Court has a duty to accept the uncontroverted affidavit and rely on same. He relied on the case of: ***LEAD MERCHANT. BANK LTD VS SALAMI (2008) 16 WRN 181 R. 3.***

Counsel submitted that there is nothing objectionable in principle in Counsel deposing to an affidavit on behalf of his Client he is representing in Court in respect of facts which came to his knowledge while investigating a brief in preparation for an action in Court. For this view, he relied on the opinion of ***Justice T.A AKINOLA AGUDA O.F.R., LL.M PhD. (LOND.)*** in his book: ***LAW AND PRACTICE RELATING TO EVIDENCE IN NIGERIA*** published in 1980 by Sweet & Maxwell Ltd of 11 New Fetter Lane, London and Film set in Great Britain, pages 62 and 63. He also referred to following decisions: ***(1). FLOUR MILLS Of NIGERIA Ltd VS R.I. OSIAN (1968) 2 All N.L.R. 13. (2). IRIS***

***WINIFRED HORN VS ROBERT RICKARD (1963) N.L.R. 67 (1963) 2 All N.L.R. 41.***

In conclusion, counsel submitted that this is a matter where the first son of a deceased Esan man has successfully buried his father and has acquired his father's assets but is refusing to accept the liabilities by introducing legal technicalities in the law of evidence to defeat the substance of the case. He submitted that equity will not allow an Esan man in Edo State to inherit the assets of his father and run away from the liabilities

He therefore urged the Court to allow the appeal.

Subsequently, upon being served with the Respondent's counsel's brief, the appellant's counsel filed a Reply on Point of law dated the 20<sup>th</sup> of December, 2017.

In his Reply, the learned counsel submitted that the knowledge of facts acquired by a solicitor in preparation for and in the conduct of a matter are attributed knowledge and that in deposing to an affidavit with regards to such facts, the solicitor need not state the name of his informant, in compliance with section 115(3) and (4) of the Evidence Act 2011. He said that the lawyer perceived with some of his senses including seeing, hearing and feeling. See: ***GARNER BLACK'S LAW DICTIONARY, Eight Edition, Pg 888 and published by West Group Thomson Business 610 Opperman Drive; P.O. Box 64568, USA.***

He therefore urged the Court to hold that the particulars deposed to in paragraphs 2, 5, 6 & 7 of the affidavit are direct evidence and there was no need to state his informant, the time and place of the information as he would have done if another person had informed him.

Furthermore, he submitted that notorious facts need no proof and that the fact of the death of the deceased; that Lawrence Aimiegbebhor was the first son; and that Lawrence inherited the asset and liabilities of his father after performing the burial of his father are notorious facts as far as the late Pius's family and their Landlady are concerned. For this view, he referred the Court to the comments by the Author of the book: ***EVIDENCE ACT 2011 (SYNOPTIC GUIDE) by JIDE OLAKAMI & CO. 1<sup>st</sup> Edition September 2011, Printed and Bound by Panaf Press, Panaf Drive, Cp1, Dawaki Rockville, Gwarinpa Abuja at Pg 105 where the Author refers to the cases of R.v. LUFFE (1807) 8 East 193; Priestly Jones v. Priestly Jones (1951) AC 391.***

Learned counsel made some further submissions which were mainly repetitions of his arguments in his original brief.

Finally, he submitted that the Supreme Court has held in a plethora of cases that the Court should pursue the substance rather than technicalities and relied on the case of: ***ACCORD PARTY VS SARAKI (2009) 16 W.R.N 130 .***



Opposing the appeal, the learned counsel for the respondent, submitted that the lower court was right in dismissing or refusing the application having found out that there are no facts to support the application in that the main paragraphs of the affidavit particularly paragraphs 2, 5, 6 and 7 are not only defective but also offends *section 115 (3) and (4) of the Evidence Act 2011*.

Learned counsel referred the Court to the Supreme Court's decision in the case of: *Dr Oladipo Maja vs. Mr Costa Samouris (2002) 6 M.J.S.C 103 at 121 paragraph G*, where the court held that a deponent to affidavit evidence who deposes to facts from his information and belief must state the source of his belief.

He submitted that the facts deposed to in paragraph 2 of the supporting affidavit is not only defective but also offends section 115 of the Evidence Act for failing to disclose the sources of his knowledge and that since the deponent was not the court bailiff, he must disclose the person who served the process and to whom it was served. He maintained that there is nothing to show that the deponent accompanied the bailiff.

Furthermore, counsel submitted that the deposition that the Respondent is the legal representative of the deceased judgment debtor who inherited the assets and liabilities of the deceased debtors and that the wife and children of the deceased debtor have not given up possession of the house also offend section 115 (2), (3) and (4) of the Evidence Act 2011.

He contended that the deposition that the respondent is a legal representative (not the administrator) of the estate of the deceased is a legal conclusion and that he inherited the assets and liabilities is also a legal argument and conclusion. He maintained that the source of information that the children and wife of the deceased judgment debtor are still living in the premises was also not disclosed.

Learned counsel submitted that the pertinent questions to ask at this stage are:

- (i) What is the attitude of the court where a deponent in an affidavit deposes to facts from his information and belief without stating the source of his information?
- (ii) What is the effect of failure to disclose source of information deposed to in an affidavit; and

(iii) What is the legal effect of the contravention of section 115 (2) of the Evidence Act in an affidavit.

He submitted that: the deponent was informed by the Defendant/Judgment creditor that the judgment debtor had died and the Respondent sought to be substituted as the Judgment debtor since he is the legal representative not only offends section 11 (1) and (2) (sic) of the Evidence Act which stipulates thus section 115(1) that when a deponent deposes to facts derive from personal knowledge or from information he believes to be true, he must state he believe same (sic).

He maintained that the deponent did not state that he believes that the information given to him by the judgment creditor /Appellant that the judgment debtor died and that he believes the information he received from the wife and children of the deceased judgment debtor that the Respondent is the legal representative. Furthermore he contended that the Respondent being the first son of the deceased judgment debtor is a legal conclusion and this offends section 115 (2) of the Evidence Act

Learned counsel contended that where a deponent in an affidavit evidence deposes to facts from his information and belief without stating the source of his information, such evidence ought not be acted upon unless the court can ascertain the source of the information and belief and unless the facts deposed to are corroborated by someone who speaks from his personal knowledge. See: *MAJA V SAMOURI (SUPRA) PP. 121 to 122*. He said that such paragraphs should be expunged from the affidavit. See also: *NEC V IZUOGU (1993) 2 NWLR PART 275 page 270 at page 287 paragraphs H – A*.

He therefore urged the Court to dismiss the appeal.

I have carefully considered all the processes filed in this appeal, together with the arguments of the learned counsel for the parties.

As earlier stated, the Issues for Determination in this appeal are as follows:

1. *Whether the trial court was right when it dismissed the motion because the material facts were not placed before it even though the deponent did not file a counter affidavit; and*
2. *Whether the lower court was right when it held that paragraphs 2,5,6 and 7 of the Appellant's affidavit are completely defective in all ramifications and offend section 115(3) and (4) of the evidence Act*

*2011 and consequently dismissed the appellant's application since there are no facts to support same.*

It appears to me that the resolution of Issue 2 is quite germane to the resolution of Issue 1. So I will determine Issue 2 before Issue 1.

## **ISSUE 2:**

Before resolving this issue, I wish to observe that in the course of his arguments, the learned counsel for the Respondent, did not limit his arguments to section 115(3) and (4) of the Evidence Act. He went further to make salient submissions on the provisions of section 115(2) of the Evidence Act which states that: ***“An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion.”***

It is pertinent to note that the ruling of the lower court was based on alleged violations of the provisions of section 115(3) and (4) of the Evidence Act. The court did not make any finding on infringement of the provisions of section 115(2). Furthermore; the Appellant did not raise any ground of appeal on infringement of the provisions of section 115(2). If the Respondent had any complaint on the infringement of the provisions of section 115(2) of the Act, the proper procedure would have been to file a cross appeal. He cannot simply raise the point in his brief of argument. See the following cases: ***Emeghara vs. Health Management Board of Imo State (1987) 2 NWLR (Pt.56) 330; and Afribank vs. Alade(2000) 13 NWLR (Pt.685) 591 at 599.*** I will therefore discountenance his arguments on section 115(2) of the Evidence Act.

This issue essentially is on the decision of the lower court that paragraphs 2,5,6 and 7 of the Appellant's affidavit are completely defective in all ramifications and offend section 115(3) and (4) of the evidence Act 2011.

In the first instance, the affidavit was deposed to by the learned counsel for the appellant. The said counsel has put forward some arguments to defend the authority of a counsel to depose to an affidavit in a case where he is acting as counsel.

I agree with him that that there is nothing objectionable in principle in Counsel deposing to an affidavit on behalf of a Client he is representing in Court in respect of facts within his knowledge. See the following decisions in support: ***IRIS HORN Vs ROBERT RICKARD (1963) All NLR 486; and CHIEF HAROLD***

***SODIPO Vs LEMMINKAINEN & ANOR (1986) All NLR 78 ;( 1986) 1 NWLR (Pt.15) 220.***

However, the courts have constantly cautioned against the practice. 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)***, the court observed thus:

***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”.***

Again 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 practice ....may 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”.***

For the avoidance of doubt, the offensive paragraphs are reproduced hereunder as follows:

***“2. That when this summons for recovery of premises was filed in court, the late Pius Amiegbebor, his wife and some of his children were living in the Plaintiff’s house where the originating writ of possession and other notices were served on him in the presence of his wife and children.***

***5. That while waiting for the Defendant/Judgment Debtor to give up possession of the house and premises and pay the judgment debt, I was informed that the Defendant/Judgment Debtor had died. That I visited the house to condole the wife and children of the deceased tenant and his wife confirmed to me that the Defendant/Judgment Debtor had died and the party sought to substitute, Lawrence Amiegbebor was deceased’s first son, therefore Legal representative of the late tenant.***

***6. That being the legal representative of the deceased Defendant/Judgment Debtor, Lawrence has inherited all assets and liabilities of the deceased Defendant/Judgment Debtor.***

***7. That the Defendant's wife and children have not given up possession of the house to the Plaintiff and the judgment debt remains unpaid".***

The complaint is that the above paragraphs offend section 115(3) and (4) of the evidence Act 2011. Again, for the avoidance of doubt, the aforesaid sections state as follows:

***"Section 115 (3) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief"***

***"Section 115 (4) When such belief is derived from information received from another person the name of his informant shall be stated and reasonable particulars shall be given respecting the informant and the time, place and circumstances of the information"***

I must state that in order to ascertain whether the facts deposed to were within the knowledge of the counsel, it is necessary to collectively examine the entire affidavit in order to determine the source of his knowledge. Each paragraph cannot be considered in isolation.

In paragraph 1 of the affidavit, the deponent stated thus:

***"That I am the counsel to the plaintiff in this case and because of my position, I am conversant with the facts of the case."*** From this opening paragraph, he started to lay the foundation for some facts which came to his knowledge while acting as counsel to the appellant.

Going through the salient paragraphs of the affidavit it is evident that the learned counsel obtained personal knowledge of some facts which he witnessed himself, while he was informed of some other facts.

For example, the first part of paragraph 3 revealed that the Deponent had full knowledge of the health condition of the late Tenant when he stated that: ***"while taking the brief from the Plaintiff, the Defendant was ill and always on bed"***.

In the second part, he stated that: ***"The Plaintiff informed me and I verily believe her that Mr. Lawrence Amiegbebor was the Defendant's first son and therefore his heir apparent."***

Again in paragraph 5 of the affidavit, he stated thus: ***"... That I visited the house to condole the wife and children of the deceased tenant and his wife confirmed to me that the Defendant/Judgment Debtor had died and the party***

***sought to substitute him, Lawrence Amiegbebhor was the deceased's first son therefore legal representative of the late tenant."***

Paragraphs 6 and 7 also further confirmed that Lawrence Amiegbebhor was the first son of the deceased Tenant, that he had not given up possession of the house and that the judgment debt had remained unpaid.

From the contents of the affidavit, it is quite clear that all these facts came to the knowledge of the deponent in the course of his duty as a counsel to the appellant and where it was necessary, he stated the source of his information. The deponent gave ***reasonable particulars respecting the informant and the time, place and circumstances of the information*** in substantial compliance with section 115(4) of the Evidence Act, 2011. The trial court was therefore in error when it struck out the alleged offending paragraphs in the affidavit in support of the motion for substitution.

I therefore resolve this Issue in favour of the Appellant.

### **ISSUE 1:**

The gravamen of this issue is whether the trial court was right when it dismissed the motion in the absence of any counter affidavit on the ground that material facts were not placed before the court.

In view of my earlier decision on Issue 2 to the effect that the lower court wrongly expunged the aforesaid paragraphs, I will therefore consider the facts contained therein in order to determine this issue.

It is settled law that uncontradicted depositions in an affidavit are deemed to be correct. See: ***Kotoye vs. Saraki (1993) 5 NWLR (Pt.296) 710 at 723.***

Where facts in an affidavit remain unchallenged, the court is bound to accept those facts as established as they are deemed to have been admitted. Those facts must be taken as true by the court unless they are obviously false to the knowledge of the court. See the case of: ***Honda Place vs. Globe Motor Holdings Nigeria Ltd. (2005) AFWLR (Pt.283) 1 at 12.***

In the light of the foregoing authorities, in the absence of any counter affidavit, I am duty bound to accept all the facts in the supporting affidavit as true. I have no reason whatsoever to doubt them.

Going through the aforesaid facts, it is clear that the said Lawrence Amiegbebhor is the first son of the deceased Tenant who has not given up possession of the house while the judgment debt remains unpaid.

It is thus expedient for Lawrence Amiegbebhor to be substituted in place of his deceased father. It is settled law that where the death of a party occurs and the action survives, the personal representative of the deceased can be substituted for the deceased. In the instant case there is uncontroverted affidavit evidence to confirm that Lawrence Amiegbebhor is the personal representative of the deceased. He ought to step into the shoes of his father at this stage of the proceedings in order not to render the judgment nugatory.

In the case of: *Eyesan vs. Sanusi (1984) 5 NSCC 271 at 283*, Obaseki JSC stated thus:

***“If the cause of action is one that survives the death of either party, appointment of a person or persons to carry on proceedings in place of the deceased is a necessary function of the court either of first instance or of appeal”.***

See also: *Tesi Opebiyi vs. Shittu Oshoboja & Anor. (1976) 10 S.C. 195.*

I hold that there are sufficient material facts to enable the court grant the application for substitution. I therefore resolve this issue in favour of the appellant.

Having resolved the two issues in favour of the appellant, this appeal succeeds and I order as follows:

1. The ruling of the Trial Court made on the 4<sup>th</sup> of November, 2015 is hereby set aside;
2. That Mr. Lawrence Amiegbebhor, the first son and legal representative of the deceased Judgment Debtor substitutes his late father; and
3. The enrolment of the judgment in the said suit should be served on Mr. Lawrence Amiegbebhor, for his compliance.

Costs assessed at N20, 000.00 (twenty thousand naira) is awarded in favour of the appellant.

P.A.AKHIHIERO  
JUDGE  
28/03/18

**COUNSEL:**

J.I.Erewele Esq. í í .í í í í í í í í í í í í í .Counsel for the Appellant.

M.A.Agbonhiebele Esq.í í í í í í í í í í í í í í Counsel for the Respondent