IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,

ON THURSDAY THE

9TH DAY OF FEBRUARY, 2023.

BETWEEN: ***SUIT NO. B/300/2007***

MRS. C. I. OSEKI ----------CLAIMANT/APPLICANT

AND

MR. OSAHENRUMWEN OGBOMO ---------DEFENDANT/RESPONDENT

RULING

This is a Ruling on a Motion on Notice dated and filed on the 18th of February, 2022 brought pursuant to Sections 39(a) & 46(1) of the Evidence Act 2011 and Order 24 Rule 1, 2 and 3, Order 1 Rule 1(2) of the Edo State High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of this Honourable Court.

By this application, the Claimant/Applicant is praying this Honourable Court for the following orders:

1. ***AN ORDER granting leave to the Claimant/Applicant to perpetuate the Testimony/Evidence of Mrs. C. I. Oseki who testified on the 6th day of November, 2017 in this suit before Honourable Justice M. O. Ighodalo (deceased) and to make use of evidence of the previous proceedings as if same was testimony given before this Honourable Court which Certified True Copy of the Proceedings is attached to the Affidavit in support of this Motion and marked as Exhibit "A".***
2. ***AN ORDER granting the Claimant/Applicant Leave to amend her 1st Further Amended Statement of Claim in the manner formulated and***

underlined in black in the proposed 2nd Further Amended Statement of Claim and to file Additional list of Documents and Written Statement on Oath of the additional witness- MR. Fred Eki Oseki hereto attached and marked Exhibits "B", "B1" and "B2" respectively.

3. ***AN ORDER granting Claimant/Applicant leave to file additional list of documents and rely on an additional document (C.T.C of Record of Proceedings of 6th day of November, 2017 and Medical Report) in proof of her case annexed as Exhibit "C".***
4. ***An Order of this Honourable Court granting the Claimant/Applicant leave to recall the Surveyor Bruno I. Odaro a witness already called in this case for the purpose of tendering a fresh litigation Survey Plan annexed hereto as Exhibit "D" to correct the suit Number and adopt Additional Witness Deposition in the circumstances.***
5. ***An Order of this Honourable Court granting the Claimant/Applicant leave to file fresh Witness Deposition for Mr. Bruno I. Odaro annexed hereto as Exhibit "E".***
6. ***AN ORDER deeming the said Exhibit "A", Exhibits "B", "B1" and "B2", Exhibit "C", Exhibit "D" and Exhibit "E" separately filed at the Registry of this Honourable Court, as properly filed and served, the prescribed fees having been paid.***

And for such further order(s) as this Honourable Court may deem necessary to make in the circumstances of this case.

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

In his written address, the learned counsel for the Claimant/Applicant, ***J.O. Oluwagbohunmi Esq.*** formulated a sole issue for determination as follows:

"Whether the Claimants/Applicants are entitled to the reliefs sought?"

Arguing the sole issue for determination, learned counsel submitted that enough materials have been placed before this Honourable Court to persuade the Court to exercise its discretion to grant the reliefs sought. He referred to paragraph 5(b-g) of the Affidavit in support of this application where they established the fact that the Claimant is now unsound, physically incapacitated and is suffering from Bilateral Osteorheumatoid Arthritis and Cortical Dementia.

Counsel referred to ***Section 39 of the Evidence Act 2011*** which states as follows:

"Statements, whether written or oral of facts in issue or relevant facts made by a person: (a) who is dead; (b) who cannot be found; (C) who has become incapable of giving evidence; or (d) who attendance cannot be procured without an amount of delay or expense which under the circumstances of this case appears to the court of unreasonable, are admissible under section 40 to 50."

Again, he referred to ***Section 46(1) of the Evidence Act*** which states as follows:

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is admissible for the purpose of proving, in a subsequent proceeding, the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in Section 39, or is kept out of the way by the adverse party."

He referred to paragraph 5(b — g) of the affidavit in support of the application and submitted that the reasons therein qualify as a ground for this application as contemplated under ***Sections 39(a) & 46(1) of the Evidence Act.***

Furthermore, he relied on the case of ***Bakare v. Bello (2002) FWLR (Pt. 107) 1298*** where ***Muhammed JCA*** stated thus:

"In this case, the evidence of Alhaji Lawal Bello who testified at the Nasarawa Area Court but had died before the proceedings at the High Court reached hearing stage' can be rightly admitted and relied on under section 34(10) of the Evidence Act (now Section 46(1) of the Evidence Act, 2011)".

Again, he referred to the case of ***Nwadinobi v. M.C.C (Nig.) Ltd (2016) 1 N.W.L.R (Pt. 1494) 427 P.454, paras. C-E*** where ***EKO, JCA***, held thus:

"Under section 46(1) of the Evidence Act, 2011 evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is admissible for the purpose of proving, in a subsequent proceeding, the truth of the fact which it states, when the witness cannot be called for any of the reasons specified in Section 39, or is kept out of the way by the adverse party. However, the provision 'of the section cannot be invoked by a party as a matter of course. He must first prove the facts or one of the facts in section 39 of the Act before he can do so."

Counsel also referred to the case of ***Laguro v. Taka (1992) 2 NWLR (Pt. 223) 278***, where the Supreme Court set out the principles guiding amendment of pleadings generally as follows:

"1. In the exercise of its power to amend a pleading, a court is guided by:

- ***a) Consideration of the justice of the case and the rights of the parties before it;***
- ***b) The need to determine the real question or questions in controversy, between the parties; and***
- ***c) The duty of a judge to see that everything is done to facilitate the hearing of any action pending before him and whenever it is possible to cure and correct an honest or unintentional blunder or mistake in the circumstances of the case and the amendment will help to expedite the hearing of the action without injustice to the other party."***

Again, he relied on the case of ***Adetutu v. Aderonfunmu (1984) 1 SC NLR 515 at 523-524*** where ***Bello JSC*** (as he then was) restated the same principles on the amendment of pleadings.

He referred to paragraph 5 of the affidavit in support and submitted that the Claimant/Applicant has proved that the amendment is deserved to enable the case to be determined on the merit.

Counsel emphasized that enough reasons have been adduced to enable this Court to grant this application and he relied on the following authorities: ***Ejikeme v. Ibekwe (1997) 7 NWLR (pt. 514) 592 at 597; Williams & Ors. V. Hope Rising Voluntary Society (1982) 13 N.C.S. 36 at 41 University of Lagos v. Algoro (1985) 1 NWlr (pt.1) 143 and U.B.A Ltd & Ors. v. Dike Nwora (1978) 11 & 12 S.C.1***
He urged the Court to grant the application.

In opposition to the application, the Respondent filed a thirteen paragraphs Counter Affidavit and a written address of his counsel.

'In his written address, the learned counsel for the Respondent, ***Efosa Okoro Esq.*** submitted that by his counter affidavit, the Respondent has given sufficient reasons why the Court should refuse the application in the interest of justice.

He informed the Court that they are opposed to prayers 1, 2 and 3 of the application because the Claimant in the course of this trial has amended her Statement of Claim so many times and by virtue of ***Order 24 (1) of the Edo State High Court (Civil Procedure) Rules, 2018*** a party may not amend his pleadings more than twice during the trials. He referred to the case of ***First Bank of Nigeria Plc vs Kayode Abraham (2009) 8 WRN 1 at 21*** where ***Aderemi JSC*** stated thus:
"Let me here say that rules of court are made to be followed. They are therefore to regulate matters in court and help parties to present their cases within a procedure for the purpose of a fair and quick trial. Indeed it is the strict compliance with these rules of court that make for quick administration of justice."

He said that another ground for the Respondent's opposition to prayers 1, 2 and 3 of the application is that the Claimant had given evidence and was cross-examined on two occasions and she cannot therefore choose the version which she wants the Court to accept.

Furthermore, counsel posited that the Claimant's evidence are solely based on historical facts and the courts have variously harped on the need to see and hear such witness to determine the veracity of such narrations. He referred to the decision of the Supreme Court in the case of ***Ukaegbu v. Nwololo (2009) 12 WRN 1 at 45 lines 28 – 47,*** where ***Ogbuagu JSC*** stated inter-alia as follows:
"Indeed in the case of Obasi Ibenye & 3 ors v. Abraham Agwu & Anor (1978) 7 SCNJ 1 at 30 – 31 per Ogundare JSC stated inter alia as follows' the dictum of Lord Denning in Kojo v. Bonsie does not mean that the demeanour of witnesses

is irrelevant in the resolution of conflicts in evidence of traditional history. What the noble and learned Lord was saying was that where witnesses honestly testify as to what had been handed down to them by words of mouth, acts in recent times should be an aid to resolve the conflict in the evidence of traditional history. But a witness may not be honestly telling what he heard from his ancestors. A trial court that sees and hears him must be in a position to determine whether or not he is honest about what he is narrating."

He therefore submitted that the Claimant needs to be seen and heard to enable this Court to determine the veracity of her narration.

Learned counsel also opposed the grant of prayers 4, 5 and 6 of the application on the ground that the Applicant has not given any cogent or compelling reasons why the court should allow her to recall a witness on the flimsy excuse that the Surveyor inadvertently used a wrong Suit Number. He referred the Court to the case of ***Mhambe v. Shidi (1994) 2 NWLR (pt326) 321*** where the Supreme Court while refusing an application for extension of time, held that ignorance, carelessness or negligence (as in the present case) is no excuse in Law. He also relied on the case of ***Samuel Okonkwo & Anor v. Austin Nwaoshai (2016) LPELR 41418*** where the court of Appeal Lagos Judicial Division held inter-alia thus:

"A situation where a party seeks to recall a witness after he has duly exercised his right to cross-examination and concluded same followed by a re-examination by the other party (Examination in chief and cross examination in this case) is a rare occurrence given the fact that it may lead to the unpalatable experience of affording a party the opportunity to have a second bite at the cherry. … Perhaps such application can be granted in the interest of justice and upon exceptional circumstance being shown by way of cogent credible and substantial material presented to the court. It seems to me that it is not one of the prayers grantable as a matter of course in the exercise of the discretionary powers of a trial court. The invocation of the inherent powers of the court in such situations must be done with caution, even when such recall is at the instance of the judge who may do so for the purpose of making the witness explain or elucidate his previous testimony".

In conclusion, he urged the Court to dismiss this application with costs.

Upon receipt of the Counter-Affidavit and the written address of the Respondent's counsel, the Applicant's counsel filed a Further Affidavit in support of the motion and a Reply in support of the motion filed on the 1st of August, 2022.

The Further Affidavit and the Reply amount to a rehash of the facts contained in the affidavit in support of the application and the written address of counsel in support of same.

I have carefully examined all the processes filed in respect of this application together with the written addresses of both counsel to the parties.

I will commence with the first prayer of the Claimant/Applicant which essentially is for leave for the Claimant/Applicant to perpetuate the Testimony/Evidence of the Claimant who testified on the 6th day of November, 2017 in this same suit before my learned brother, Honourable Justice M. O. Ighodalo (now deceased) and to make use of the aforesaid evidence in this same suit.

It is settled law that evidence given in previous proceedings cannot be relied upon except as provided for by the provisions of the ***Evidence Act, 2011***. In the case of ***AMINU & ORS. VS. HASSAN & ORS. (2014) 5 NWLR (PT. 1400) P. 287*** the Supreme Court considered the statutory provisions on evidence given in previous proceedings as enshrined in ***Section 34 of the former Evidence Act*** now ***Section 46 of the Evidence Act of 2011*** and held as follows***:-"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to make it is relevant for the purpose of proving, in subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case, the Court considers unreasonable. Provided:-***

(a) That the proceeding was between the same parties or their representatives in interest.

(b) That the adverse party in the first proceedings had the right and opportunity to cross-examine, and

(c) That the questions in issue were substantially the same in the first as in the second proceedings".

Again in the case of ***EZE VS. ENE & ANOR (2017) LPELR- SC295/2006,*** the Supreme Court held per ***Rhodes-Vivour, JSC*** held as follows:

"Section 46 (1) of the Evidence Act, 2011 lays down the condition under which secondary evidence of the testimony of a witness given in a former proceeding be it civil or criminal is admissible in a subsequent proceedings or in a later stage of the same proceedings. This is premised on the position of the law that the best evidence available must always be produced and used by the Courts so that the rights of litigants are correctly decided. The power under Section 46 (1) must at all times be exercised with great caution. For instance death or incapability to give evidence must be proved strictly and the onus of proving that a witness is dead or cannot be found is on the party who wishes to rely on the evidence. The following conditions must be fulfilled before a previous testimony can be admitted in evidence. Once any of them is absent, the evidence to be relied on would be inadmissible

1. The evidence must have been given in judicial proceedings.

2. The first proceedings must be between the same parties as the second proceedings, and the identity of the parties in the two proceedings must be substantial and not nominal.
3. The party against whom the testimony is tendered must have had opportunity of cross-examining the witnesses when his testimony was taken.
4. The issues in both proceedings must be the same or substantially the same.
5. The witness must be incapable of coming to Court in the subsequent proceeding on account of death or incapability of giving evidence or prevented from coming to Court by the adverse Party, or bringing him to Court would entail huge expense or unreasonable amount of delay. See IKENYE & ANOR. VS. OFUME & ORS. (1985) 16 NSCC (PT. 1) 379.

From the above authorities, it is clear that all these requirements must be established before evidence in a previous proceedings can be used in a subsequent proceedings.

Coming to the instant application, upon a careful examination of the affidavit and the counter-affidavit it is incontrovertible that the evidence is from a previous judicial proceeding between the same parties on the same subject matter, Furthermore, the Defendant/Respondent actually cross-examined the witness when her testimony was taken.

On the issue of the inability of the witness to come to Court to testify again, the Applicant has presented a medical report to show that the witness is now unsound, physically incapacitated and is suffering from Bilateral Osteorheumatoid Arthritis and Cortical Dementia. In effect, the witness is medically incapable of coming to Court to testify again in this present proceedings.

The Defendant/Respondent has not adduced any medical evidence to controvert the fact of the witness' incapability. In the absence of any such rebuttal, I hold that the Claimant/Applicant has adduced sufficient evidence to enable me grant prayer 1 of this application.

Incidentally, prayers 2 and 3 of this application which are for amendments of the Court processes to facilitate the adoption of the previous evidence of the witness. The Defendant/Respondent's objection to the amendment is inter alia that the Claimant in the course of this trial has amended her Statement of Claim so many times and that by virtue of ***Order 24 (1) of the Edo State High Court (Civil Procedure) Rules, 2018,*** a party may not amend his pleadings more than twice during the trials.

Now the relevant provision of our rules is actually ***Order 24 (1) of the Edo State High Court (Civil Procedure) Rules, 2018*** which provides thus:
"A party may amend his originating process and pleadings at any time before the settlement of issues and not more than twice during the trial but before the close

of the case, provided the Court may grant more than two amendments in exceptional circumstances."(Underlining, mine)

By the above provisions of the Rules of the Court, it is apparent that a party can amend his originating processes more than two times during the hearing of a suit before the close of hearing in exceptional circumstances. See the following cases on the point: ***Oraekwe V. Chukwuma (2012) 1 NWLR (Pt. 1389) 159 @ p. 200; Ugwu & Anor V. Ararume & Anor (2007) 6 SC (Pt. 1) 88; and Navy Captain Olufemi Pearse (rtd) v. Jinadu & anor (Pp. 40-41 paras. B).***

Furthermore, it is settled law that an amendment could be allowed at any time provided the amendment is not intended to overreach, or will entail injustice to the other party or that the party seeking the amendment is acting mala fide. See: ***MR. ADEBOWALE ADENIYI V. MRS. ADEBOWALE O. OMOLABAKE (2022) LPELR-57841(CA)***.

Taking into consideration the precarious health condition of the Claimant/Applicant as evidenced in the medical report attached to the supporting affidavit, I am of the view that this is an exceptional circumstance to warrant the amendment of the pleadings to enable the evidence in the previous proceedings to be admissible in the present proceedings.

Sequel to the foregoing, I am of the view that prayers 2 and 3 should be granted in the interest of justice.

Prayers 4, 5 and 6 are requesting for leave to recall the Surveyor Bruno I. Odaro in order to tender a fresh litigation Survey Plan and to file and adopt an additional witness deposition in the circumstances.

The overriding factor in the consideration of an application to re-call a witness is whether or not the interest of justice requires that the application should be granted. In other words, an application by a party to recall a witness who had already given evidence should succeed where the interest of justice requires it. The party applying to recall the witness must therefore, among other things, supply sufficient materials relating to why he wants the witness recalled, and it is based on this that the trial Judge will decide whether or not the justice of the case warrants him to exercise his discretion in his favour. See ***Khalifa V Onotu (2016) LPELR-41163(CA) 44-46; Musa V Dalwa (2010) LPELR-9154(CA) 9, paras C-D; Tiwani Ltd V Citi Trust Merchant Bank Ltd (1997) 8 NWLR (Pt. 515); & Willoughby V IMB Ltd (1987) 1 NWLR (Pt. 48) 105***.

Thus, the recall of a witness is predicated mainly on the peculiar facts and given circumstances of a particular case, coupled with its attendant exigencies. The decision to grant or refuse same is however undoubtedly discretionary, which discretion must however be exercised judicially and judiciously. ***UNUM V. ASAGH (2018) LPELR-44254(CA***).

In the instant case, in paragraph 5(k) and (l) of the supporting affidavit, the Claimant/Applicant adduced some explanations why it is expedient to recall the Surveyor. In the aforesaid paragraphs, the deponent explained that the Surveyor inadvertently printed and submitted to Counsel a Litigation Survey Plan with an incorrect Suit number. That there is a need to file a fresh Litigation Survey Plan to reflect the correct Suit Number and Witness Deposition for the Surveyor in the circumstance of this case. That there is the need to recall him to tender the correct Litigation Survey plan in the overriding interest of Justice.

Although the learned counsel for the Defendant/Respondent opposed prayers 4, 5 and 6, he did not say how the granting of the prayers to recall will prejudice the Defendant's case.

In the event, I am of the view that it will be in the overriding interest of justice to grant the aforesaid prayers.

Sequel to the foregoing, I hold that this Application is meritorious and it is granted as follows:

1. ***AN ORDER granting leave to the Claimant/Applicant to perpetuate the Testimony/Evidence of Mrs. C. I. Oseki who testified on the 6th day of November, 2017 in this suit before Honourable Justice M. O. Ighodalo (deceased) and to make use of evidence of the previous proceedings as if same was testimony given before this Honourable Court which Certified True Copy of the Proceedings is attached to the Affidavit in support of this Motion and marked as Exhibit "A".***
2. ***AN ORDER granting the Claimant/Applicant Leave to amend her 1st Further Amended Statement of Claim in the manner formulated and underlined in black in the proposed 2nd Further Amended Statement of Claim and to file Additional list of Documents and Written Statement on Oath of the additional witness- MR. Fred Eki Oseki hereto attached and marked Exhibits "B", "B1" and "B2" respectively.***
3. ***AN ORDER granting Claimant/Applicant leave to file additional list of documents and rely on an additional document (C.T.C of Record of Proceedings of 6th day of November, 2017 and Medical Report) in proof of her case annexed as Exhibit "C".***
4. ***An Order of this Honourable Court granting the Claimant/Applicant leave to recall the Surveyor Bruno I. Odaro a witness already called in this case for the purpose of tendering a fresh litigation Survey Plan annexed hereto as Exhibit "D" to correct the suit Number and adopt Additional Witness Deposition in the circumstances.***
5. ***An Order of this Honourable Court granting the Claimant/Applicant leave to file fresh Witness Deposition for Mr. Bruno I. Odaro annexed hereto as Exhibit "E".***

6. AN ORDER deeming the said Exhibit "A", Exhibits "B", "B1" and "B2", Exhibit "C", Exhibit "D" and Exhibit "E" separately filed at the Registry of this Honourable Court, as properly filed and served, the prescribed fees having been paid.

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

P.A.AKHIHIERO
JUDGE
09/02/2023

<u>COUNSEL:</u>
J.O. OLUWAGBOHUNMI ESQ…..……..…..CLAIMANT/APPLICANT
EFOSA OKORO ESQ…….……..……DEFENDANT/RESPONDENT