

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS NIGERIA
ON FRIDAY THE 19TH DAY OF FEBRUARY, 2016
BEFORE THE HONOURABLE JUSTICE

M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/1776/2015

BETWEEN:

- | | | |
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| <p>1. DAJCOM MANUFACTURING LIMITED
(IN RECEIVERSHIP)
SUING BY ITS RECEIVER/MANAGER
PRISCILLA OGWEMOH</p> <p>2. PRISCILLA OGWEMOH</p> <p>3. ACCESS BANK PLC</p> | } | <p>APPLICANTS/
RESPONDENTS</p> |
|--|---|---|

AND

<p>DAJCOM COMPANY LIMITED</p>	<p>.....</p>	<p>RESPONDENT/ APPLICANT</p>
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RULING

This is a Preliminary Objection dated 22nd January, 2016 in these terms:-

**“NOTICE OF PRELIMINARY OBJECTION BROUGHT
PURSUANT TO THE INHERENT JURISDICTION OF THIS
HONOURABLE COURT**

TAKE NOTICE that at the hearing of the Originating Summons the Respondent/Applicant shall raise an objection to the propriety and competence of the Applicants/Respondents' Originating Summons dated 11th December 2015 and shall be praying this Honourable Court for an order striking out the said Originating Summons dated and filed on 11th December 2015.

And for such further or other Orders as this Honourable Court may deem fit to make in the circumstances.

AND TAKE FURTHER NOTICE THAT THE GROUNDS FOR THIS APPLICATION ARE:-

- i. That the questions for determination in the Originating Summons cannot be determined against the Respondent/ Applicant herein
- ii. The Respondent/Applicant is not a proper party against whom the questions for determination can be determined.”

The application was accompanied with a written address. The Respondents filed a written address in opposition.

At the hearing, Learned Counsel for the parties relied on the processes filed and adopted their respective written addresses.

In the Applicant's written address, it was argued that the questions for determination cannot be effectually determined without the presence of Directors or Shareholders of the 1st Applicant as parties. That the Applicant is not a proper party against which the questions for determination as presently constituted can be properly determined. The Court was urged to grant the application.

These cases were relied on:-

- (1) **OJO VS. OGBE (2007) LPELR-8315**
- (2) **KANU VS. OBETA (2015) LPELR-24432**
- (3) **CCB PLC VS. OKPALA (1997) LPELR-6278.**

It was argued by the Respondents that the Applicant is a proper party to the suit being a party to the Deed of Debenture. The Court was urged to dismiss the application. The cases of **COTECHNA INTL LTD VS. CHURCHGATE NIG LTD (2010) 18 NWLR (PT. 1225) 346** and **AG FED VS. A.I.C. LTD (2000) 10 NWLR (PT. 675) 293** were relied on.

I have read the processes filed . Should the objection be sustained ?.

In determining this application, I shall restrict myself to the Originating process filed by the Respondents to this application. See **IKINE VS. EDJERODE (2001) 18 NWLR (PT. 745) 446; CBN VS. SAP NIG LTD (2005) 3 NWLR (PT. 911) 152.**

There is no doubt that the Applicant to this application is a party to the Deed of All Assets Debenture dated 2nd August 2011 that calls for interpretation in this suit. Being a party to the said instrument, I am of the view that it is a proper party to this action. See generally **COTECHNA INTL LTD VS. CHRUCHGATE NIG LTD (2010) 18 NWLR (PT. 1225) 346; AG FED VS. AIC LTD (2000) 10 NWLR (PT. 675) 293.**

This is not all. I agree with Learned Counsel to the Applicant that the questions for determination before this Court cannot be effectively and effectually determined without the presence of directors or shareholders of the 1st Applicant as parties.

Often times persons who ought to be parties in

actions are not made parties. It also occurs that persons who ought not to be made parties are made parties in actions. In legal parlance these defects are referred to as non-joinder and misjoinder of parties. The failure to join a person as a party is non-joinder, while the erroneous joining of a person as a party is misjoinder.

Non-joinder and misjoinder were judicially construed by Augie, JCA in **OLUWANIYI V. ADEWUMI (2008) 13 NWLR (PT. 1104) 387 CA AT P. 405 PARAS F-G**. According to his Lordship.

The failure to join as a party to the suit, a person who ought to have been so joined either as plaintiff or as defendant, gives rise to the mistake of non-joinder of party. This mistake envisages a situation where the action should have been properly constituted by two or more plaintiffs or defendants. Misjoinder of party, on the other hand, is the joinder, as a party to the action, of a person who ought not to have been joined.' See also **P. W. T. (NIG) LTD V. J.B.O. INTERNATIONAL (2010) 19 NWLR (PT. 1226) 1 SC**

The Supreme Court distilled the effect of non-joinder and misjoinder of a party in the case of **ANYANWOKO V. OKOYE (2010) 5 NWLR (PT. 1188) 497 SC** . Justice Tabai, JSC in the lead judgment approved thus:

On this issue of the non-joinder of all the necessary parties in the suit the learned trial Judge Hussein Mukhtar, J in his ruling at page 19 of the record had this to say:

"The last ground is premised on non-joinder of some children who are claimed to be children of the deceased and who should be interested persons. The law is trite that non-joinder *per se* does not affect the jurisdiction of the Court nor the competence of the suit. An application may be made to join or disjoin any person who must be a proper party or who ought not to be a party but has been wrongly joined respectively."

The Court below agreed with this reasoning and conclusion, finding that it was unassailable . I

also endorse the reasoning and conclusion. The non-joinder or mis-joinder of a necessary party is only a procedural irregularity which can be corrected in the Course of the proceedings by recourse to the relevant Rules of Court and does not in any way affect the jurisdiction of the Court or competence of the suit” See also . **PEENOK INVESTMENTS LTD VS. HOTEL PRESIDENTIAL LTD (1982) 13 NSCC 477.**

Similarly, in **OLUWANIYI V. ADEWUMI (2008) 13 NWLR (PT. 1104) 387 CA**, Augie JCA, who was armed with earlier authorities, agreed that non-joinder of a party will not touch on the jurisdiction of the Court or the competence of the action. “In the circumstances”, argued his Lordship,

The appellant’s contention that the lower Court should *have struck* out the application must fail, because *contrary* to what she would have us believe, this is *simple* case of non-joinder, which cannot be the basis for ousting the jurisdiction

of a competent court of law- see **ONIBUDO V. ABDULLAI** (*supra*), where the Court held *that the* remedy of non-joinder is not ousting the jurisdiction of the court, which leads to a subsequent *striking* out of the matter, but for the Court to join the necessary party whether as plaintiff or as defendant. *Thus, the* fact that a necessary party to the action has *not* been joined will not render the action a nullity - see **AYORINDE V. ONI (SUPRA) & ATUEGBU V. AWKA SOUTH L.G. (SUPRA)** where the court held -

"Proceedings will not be a nullity on the ground of *lack* of competence of the court or lack of jurisdiction where a plaintiff fails to join a party who ought to have been joined. *In such a case the court may deal with the matter in controversy so far as regards the rights and interests of the*

parties actually before it." (Italics mine)

In this case, the lower Court decided, and rightly so in my *View*, that in addition to the appellant who should be Defendant in her personal capacity, the Registered Trustees of the Church should also be joined as Defendants.' See also **ONIBUDO VS. ABDULLAI (1991) 2 NWLR (PT. 172) 230 CA; AYORINDE VS. ONI (2000) 3 NWLR (PT. 649) 348 SC AND ATUEGBU VS. AWKA SOUTH LOCAL GOVERNMENT (2002) 15 NWLR (PT. 791) 635 CA.**

The position is different where no proper party is before the Court, to at least, sustain the matter. In other words, where the Claimant or the Defendant is a complete alien to the action before the Court, there is no saving grace for the suit, but to strike it out. If on the other hand, though the Claimant and Defendant are competent parties, other necessary parties have not been joined, the omission will not *ipso*

facto defeat the action. The omission may be treated as a mere irregularity which may be cured by joining those parties.

Justice Karibi-Whyte valiantly canvassed the above positions in the Supreme Court case of **AYORINDE V. ONI (2000) 3 NWLR (PT. 649) 348 SC.** In the words of the learned Justice of the Supreme Court:

“It follows therefore from this finding that there are no Defendants against whom Plaintiffs can proceed. In the absence of any competent Defendant, as the finding has disclosed before the case went on trial, the action should have been struck out on the ground that it is improperly constituted. The Court of Appeal was right to so hold, and learned counsel for the Respondents has so correctly submitted. It is elementary and fundamental requirement of the institution of actions in Court that a Defendant should not be brought to court unless a Plaintiff has a claim against him. In **EKPERE & ORS. V. AFORIJE & ORS. (1972) 1 ALL NLR (PT. 1) 220**, the Plaintiffs sought as representatives of the Mosogan

Community of Jesse Clan which in effect meant that the Jesse Clan had no interest in the land in dispute. The Jesse Clan had not been made a Defendant in the action through appropriate representation. Since the relief claimed was against the Jesse Clan, and the Jesse Clan was not a party to the action, it was held that the action was entirely wrongly constituted and struck out with costs.

So, in this case since the necessary defendants against whom Plaintiffs are claiming reliefs have not been brought before the Court to enable the exercise by the Court of its adjudicatory jurisdiction, the action is accordingly not properly constituted - See **MADUKOLU V. NKEMDILIM & ORS(1962) 1 ALL NLR 587 .**

The situation in the instant appeal is different from the case relied upon in the submission by learned counsel to the Appellants, where a necessary party to an action, for one reason or the other was not joined, the non-joinder will not render the judgment a nullity. It is a correct proposition of law that where an action is

properly constituted, with a Plaintiff with legal capacity to bring the action, a defendant with capacity to defend, and a claim with cause of action against the defendants, and the action has satisfied all pre-conditions for instituting the action, the fact that a necessary party to the action has not been joined, is not fatal to the action and will not render the action a nullity - See **OLADEINDE & ANOR V ODUWOLE (1962) WNLR 42.**

Where the nature of the evidence before the Court is such that the case of the parties before it can be determined in the absence of those not joined, it can proceed to do so. It is only in those cases where it will not be right and the court cannot properly determine the issues before it in the absence of the parties whose participation in the proceeding is essential for the proper, effectual and complete determination of the issues before it, will it be necessary to insist on the joinder of such necessary parties - see **UKU & ORS V. OKUMAGBA & ORS. (1974) 3 SC 35; PEENOK V. HOTEL PRESIDENTIAL LTD. (1982) 12 SC 1, 48; GREEN V. GREEN (1987) 3 NWLR (PT. 61) 480.**

In the appeal before us, the Plaintiffs have not brought

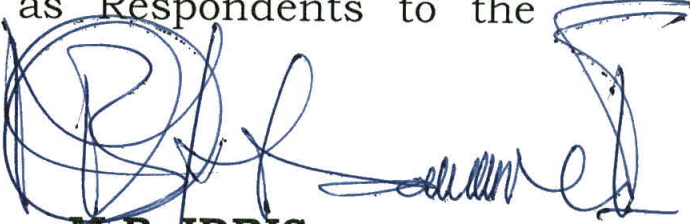
the Defendants against whom the claim is being sought to enable the exercise of the jurisdiction of the court for the effectual and complete determination of the issues. This is not the case of joinder. The Plaintiffs have not brought the Defendants against whom a claim has been made. In the absence of the real Defendants, the Court cannot proceed with the claim of the Plaintiff. It is left with the only option to strike out the action”.

See also **P & C.H.S.C. LTD VS. MIGFO NIG LTD (2009) 11 NWLR (PT. 1153) 611.**

The non joinder of the directors or shareholders of the 1st Applicant is not at this stage fatal to this case. By Order 9 Rule 14(3) of the Rules, the Judge may order that the name of any party who ought to have been joined or whose presence before the Court is necessary to effectually and completely adjudicate upon and settle the questions involved in the proceedings be added.

Pursuant to Order 9 Rule 14(3) supra, the Applicants are hereby directed to join as parties to this action the

Directors of the 1st Applicant as Respondents to the substantive action.



M.B. IDRIS
JUDGE
19/2/16

A. Sobowale with S.A. Bashorun for the Applicants/Respondents

B. Koku SAN with T.Ipaye and O. Koku for the Respondent/Applicant