IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABAKALIKI JUDICIAL DIVISION
HOLDEN AT ABAKALIKI

ON TUESDAY THE 6TH DAY OF DECEMBER, 2016
BEFORE HIS LORDSHIP HON. JUSTICE AKINTAYO ALUKO
(JUDGE)

SUIT NO: FHC/AI/CS/31/2009

BETWEEN:

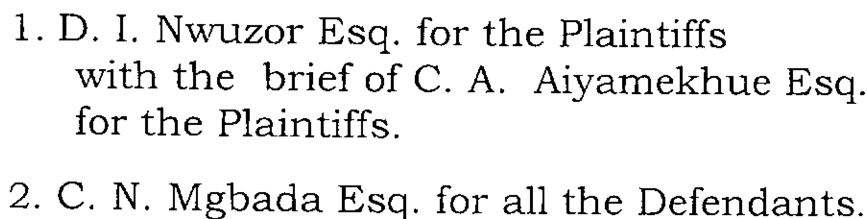
1. PATRICK U. CHUKWU
2. STEVEN O. OPOKE
(For themselves and on behalf of the four villages that make up Ameka Community, Ezza South L.G.A, Ebonyi State) } PLAINTIFFS/ RESPONDENTS

AND

1. DR. OFFIA NWALI
2. MRS. OFFIA NWALI
3. MR. MICHAEL NWALI
4. MR. MONDAY CHUKWU
5. MRS. ADAEKA EGBE NWOCHI
6. MR. CHUKWUMA NWINYA
7. MR. CHIBUEZE THEOPHILUS UGURU
8. BARR. GODFREY C. OGBUINYA
9. MR. VICTOR MADUBUAKU CHIKA
10. MR. IKECHUKWU OKEN
11. SOUTHFIELD MOBILE NIG. LTD

} DEFENDANTS/ APPLICANTS

APPEARANCES:



1. D. I. Nwuzor Esq. for the Plaintiffs with the brief of C. A. Aiyamekhue Esq. for the Plaintiffs.

2. C. N. Mgbada Esq. for all the Defendants.

RULING

This is a ruling on the Notice of Preliminary Objection initiated by the Defendants/applicants against this suit on the 13th day of April 2016.

In the Defendants/Applicants' Notice of Preliminary Objection dated 12th day of April 2016, they raise the following preliminary objections:

(1) That the Plaintiffs/Respondents lack the capacity and/or locus standi to bring this suit on behalf of Ameka community;

(2) That this suit as presently constituted is incompetent and this Honourable Court lacks the jurisdiction to entertain same;

The Defendants/Applicants' Preliminary Objections were premised on the following grounds, namely;

(1) That the Plaintiffs/Respondents have no legal right to protect by bringing this suit.

(2) That this suit was commenced without the authority and mandate of the Attorney General of the Federation.

(3) That the Plaintiffs are neither elected leaders of Ameka community, elders nor any decision making bodies in Ameka community.

(4) That the interest which the Plaintiffs/Respondents are seeking to protect in this suit is their selfish and

personal interest and not the general interest of the members of Ameka Community.

Parties effectively joined issues on the Applicants' Preliminary Objection when the Plaintiffs/Respondents filed their counter affidavit and written address on the 6th day of May 2016. The Defendants/Applicants filed their further affidavit against the counter affidavit and reply on point of law on the 12th day of May 2016. Consequently, in response to the further affidavit of the Defendants/Applicants, the Plaintiffs/Respondents filed their further counter affidavit on the 19th day of May 2016.

Both parties adopted their respective written addresses over the Defendants/Applicants' preliminary objection on the 25th day of October 2016. Before going into the issues for determination in the preliminary objection, it is expedient to state briefly facts leading to filing of the said preliminary objection, it goes thus:

The Plaintiffs by their writ of summons and statement of claim dated 27th October 2009 instituted this suit on the 1st day of February 2010 for themselves and on behalf of the four villages that make up Ameka Community, Ezza south L.G.A. Ebonyi State against the Defendants.

Upon service and receipt of the Plaintiffs' originating processes, an appearance was entered for all the Defendants vide

Memorandum of Appearance dated 17th February 2010 filed on the same date. Annexed to the Defendants' Memorandum of Appearance was Notice of preliminary objection of the Defendants also dated 17th February 2010. It is on record that this suit continue to remain on the cause list due to activities of Counsel in the case and the reason of transfer of presiding Judges before whom the case had come up at different times and stage in the life of the case.

It is also on record that the Plaintiffs' joint statement of claim was amended by order of this court made on the 16th day of June 2014.

Without any appreciable progress in the case, the Defendants initiated this preliminary objection against the suit on the 13th day of April 2016 over which both parties have now joined issues.

Both Plaintiffs and Defendants seem to be ad-idem on issue(s) for determination in this case, as the Plaintiffs have adopted the sole issue for determination as formulated by the Defendants.

The issue is;

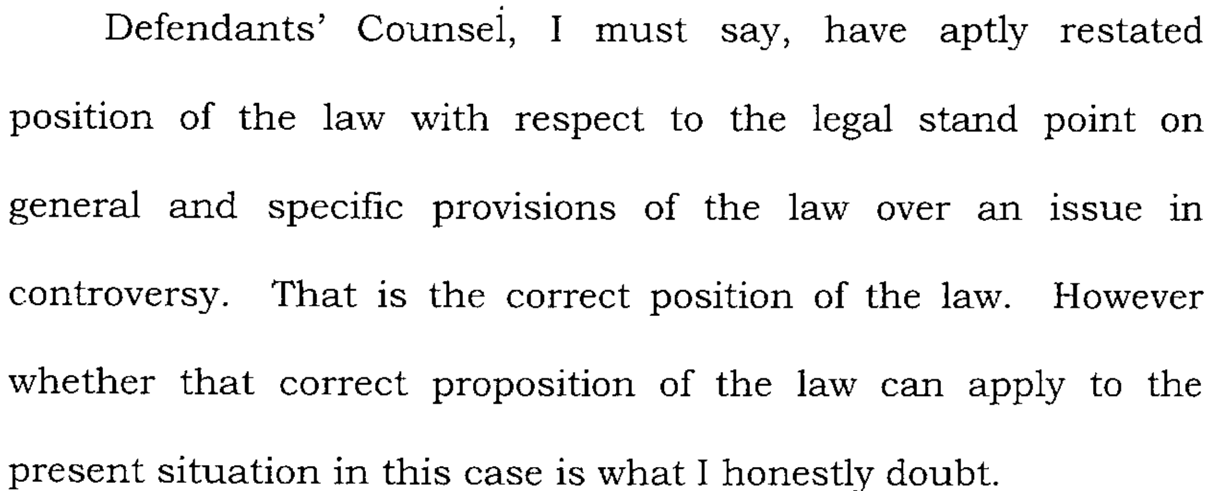
"whether the Plaintiffs have capacity to institute this suit".

Before going into this sole issue, let me determine and make pronouncement on the point of law raised by Defendants' Counsel against further counter affidavit of the Plaintiffs, sworn to by 1st Plaintiff on the 19th day of May 2016. Defendants' Counsel had urged the court to strike out the further counter affidavit on the grounds that same is an aberation in our civil jurisprudence, unknown to law and not being provided for under the Rules of this court.

In reaction to the argument of Defendants' Counsel, Plaintiffs' Counsel sought refuge under the provisions of order 27 of the rules of this court which deals with affidavits. Counsel submitted that when new issues are raised in any type of affidavit served on a party, the party is entitled to make a reply because the rule of affidavit evidence is that a fact not denied is assumed admitted. Counsel maintained that order 27 does not mention any type of affidavit but only refers to affidavit. On point of law, Defendants' Counsel referred the court to the provisions of order 26 of the Rules of this court.

Counsel submitted that order 27 only mentions the issue of affidavit to the extent of describing the form an affidavit should take. Counsel submitted that order 26 which provides specifically as to the kinds of affidavit permissible under the law

is more relevant on the issue. Counsel maintained that order 27 is of general provisions while order 26 is of specific provisions. Counsel argued that when an issue is governed by general provision and specific provision of the law, the specific provision shall have pre-eminence and govern the issue and will take precedence over the general provision. He concluded that after filing of further affidavit, the Rules does not provide for any other affidavit.



Defendants' Counsel, I must say, have aptly restated position of the law with respect to the legal stand point on general and specific provisions of the law over an issue in controversy. That is the correct position of the law. However whether that correct proposition of the law can apply to the present situation in this case is what I honestly doubt.

It may be true that the rules does not specifically mention further counter affidavit. No doubt, by order 27 rule 3 of the rules of this court, this court may receive any affidavit sworn for the purpose of being used in any proceeding notwithstanding any defect by misdescription of parties or otherwise in the title or jurat or any other irregularity in the form thereof. The provision of order 27 is therefore more apt and specific in this case than the provision of order 26 being cited by Defendants' Counsel.

Even the further affidavit of the Defendants will be caught by the provisions of order 26 of the Rules if same is to be applied to the letter. Order 26 relied upon by the Defendants' Counsel does not provide for a further affidavit, it only stops at filing of counter affidavit and written address, see order 26 rule 5.

While rules of court must always be obeyed, the current position in our administration of justice system is that technicality will not be adhered to at the expanse of fairness and justice.

The rules of court are designed to assist the parties in putting forward their case before the court. They are not intended to deny parties of the opportunity of presenting their case thereby resulting in injustice see UTC (Nig.) Ltd vs. Pamotei (1989) LPELR- 3276 (SC); (1989) 3 SC (Pt. 1) 79; (1989) 2 NWLR (Pt. 103) 244.

The Plaintiffs have said that they were by their further counter affidavit reacting to the new issues raised by the Defendants in their further affidavit, this, the Defendants did not deny that they did not raise new issues in their further affidavit. It will be against the principle of fair hearing if the Plaintiffs are shut out or prevented from reacting to what they call new issues in the Defendants' further affidavit, a court process which is not

frivolous or reckless and supported by law will not amount to abuse of court process- see Opekun vs. Sadiq (2003) 5 NWLR (Pt. 841) 475, ANPP vs. Haruna (2003) 14 NWLR (Pt. 841) 564.

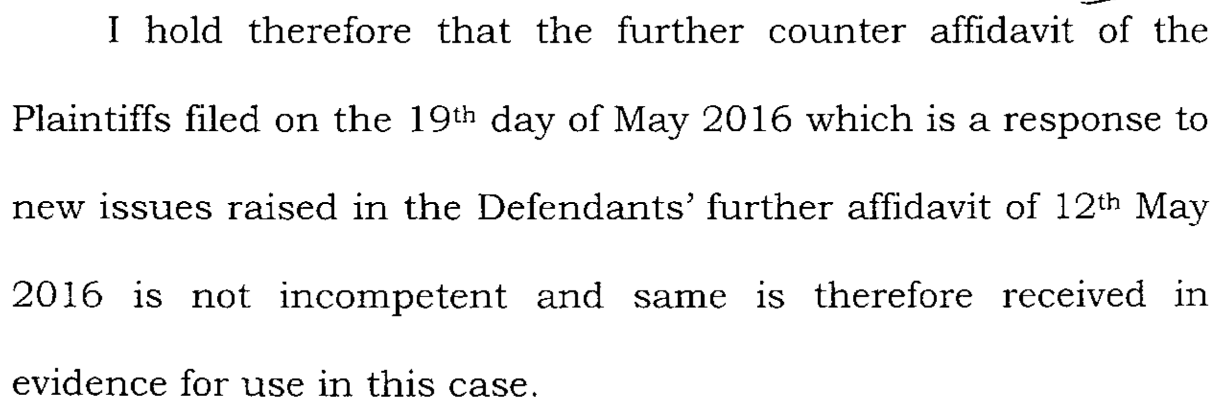
The law is that until arguments in a matter, which is to be determined by affidavit evidence are taken and concluded, a party is at liberty to depose to further affidavits, counter affidavits, or further counter affidavits that would bring all issues in controversy to the attention of the court in order to ensure a just determination of the matter, see Court of Appeal decision per Otisi JCA at page 12, paragraphs B – D in Isaac vs. George & Ors (2013) LPELR – 19994 (CA).

On the submission of Defendants' Counsel that further counter affidavit is an aberation in our civil jurisprudence, this is not correct, as will be found out in the case of Agbachi vs. Azubuike (2010) LPELR-3646 (CA) where the Court of Appeal held thus:

"it is trite that where facts in respect of anything deposed to in a counter affidavit or further counter affidavit are not met or addressed by the other party in a further and or better affidavit, the proper and only conclusion to reach is that the facts stated therein remain unchallenged and uncontroverted", see Uzodinma vs. Izunaso & Ors (2011) LPELR- 20027 (CA); Isa (rtd) vs. Abacha

& Ors (2011) LPELR – 19745 (CA); AG Ondo State vs. AG Ekiti state (2001) 17 NWLR (pt. 743) P. 706 at PP. 749-750.

Therefore, by the provisions of order 27(3) of the rules of this court and by rule of practice known to our superior courts as shown in the above cases, further counter affidavit, further affidavit, further and better counter affidavit as the case may though not specifically provided for under the Rules of court, cannot be described as an aberation in our civil jurisprudence or unknown to law.



I hold therefore that the further counter affidavit of the Plaintiffs filed on the 19th day of May 2016 which is a response to new issues raised in the Defendants' further affidavit of 12th May 2016 is not incompetent and same is therefore received in evidence for use in this case.

On the sole issue for determination in the preliminary objection of the Defendants, I will now consider all the originating processes filed in this suit and the affidavit evidence of parties as they relate to the preliminary objection.

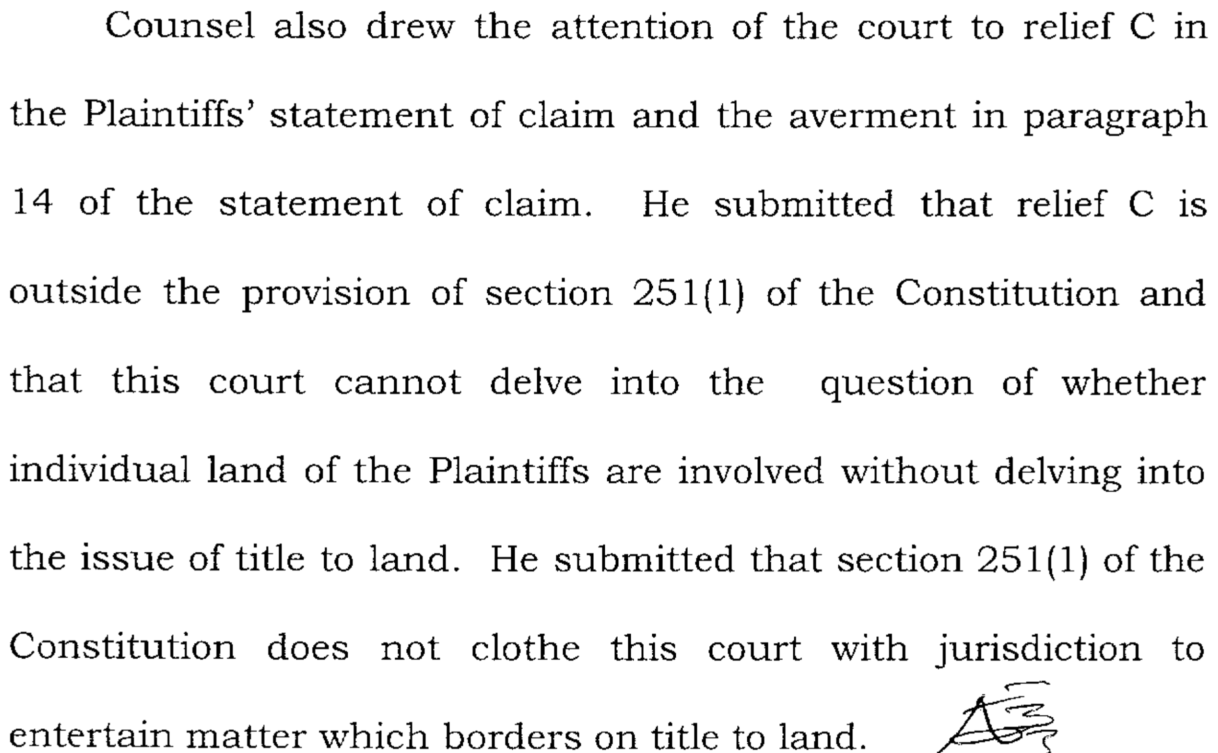
Once again and for emphasis, the sole issue for determination here is;

"whether the Plaintiffs have capacity to institute this suit".

From the main affidavit, further affidavit and written submissions of the Defendants in support of their preliminary objection, the summary of their case is that the Plaintiffs have no locus to institute the present action. They maintain that Ameka community did not authorize Plaintiffs to institute this suit and that consent of the Attorney General of the Federation was not sought and obtained before filing this suit. They submitted that the Plaintiffs instituted this action for their selfish and personal interest. They submitted that the Plaintiffs instituted this suit over Mbareke Ameka Mining site, property of Federal Government of Nigeria. They argued that the Plaintiffs have failed to show by evidence that they own the surface right over the Mining site, which is the exclusive property of the Federal Government of Nigeria. Defendants maintained that the Plaintiffs fail to show that they are the beneficial owners of royalty accruable to the entire Ameka community over the Mining site at Mbareke. They are of the view that the Plaintiffs fail to disclose any legal right that need to be protected by the institution of this suit.

The defendants' Counsel submitted that on payment of surface rent as being claimed by the Plaintiffs, that it is the responsibility of the Minister to determine the rate or what surface rent should be. He submitted that the court cannot

assume jurisdiction in this case until the Minister has determined the rate of surface rent payable. Counsel relied on the provisions of section 102(1)(3) of the Nigerian Minerals and Mining Act.



Counsel also drew the attention of the court to relief C in the Plaintiffs' statement of claim and the averment in paragraph 14 of the statement of claim. He submitted that relief C is outside the provision of section 251(1) of the Constitution and that this court cannot delve into the question of whether individual land of the Plaintiffs are involved without delving into the issue of title to land. He submitted that section 251(1) of the Constitution does not clothe this court with jurisdiction to entertain matter which borders on title to land.

On relief (d) on the Plaintiffs' statement of claim, Counsel submitted that the Plaintiffs allege acts of illegality and unconstitutionality against the Defendants over their mining activities and yet they are asking for payment of surface rent, thereby blowing hot and cold at the same time. Counsel maintained that in view of the reliefs pointed out from the statement of claim of the Plaintiffs, the suit ought to have been brought by the Attorney General of the Federation.

Counsel cited sections 1(1)(2) and 153 of 1999 Nigerian Mineral and Mining Act (which is now repealed by section 161 of the Nigerian Mineral and Mining Act 2007) and also relied on several decisions of Appellate courts which were consulted while writing this ruling.

The Plaintiffs in their turn, and as contained in their counter affidavit, further counter affidavit and written submissions in support, maintain that they possess the requisite locus to have instituted this suit. They refer the court to their counter affidavit and further counter affidavit. They maintain that the entire Ameka community authorized them to institute this suit on behalf of the entire members of the community with the exception of the Defendants. They rely heavily on their statement of claim where they allege breach of the right of Ameka community as the original owner or occupier of the entire piece of land known and called Mbareke Ameka Mining site. They allege denial of the community of surface rent accruable from mining operation of the 11th Defendant on the mining site. They allege that the defendant conspired with themselves by planting the 11th defendant on the mining site for the selfish interest of the defendants to the detriment of the community. They alleged that the defendants forged consent letter in the name of the

community. They alleged fraud against the defendants. They alleged that the 1st – 8th defendants concluded to sign lease agreement with 9th – 11th defendants without the knowledge, consent or approval of the community. They alleged that the defendants caused illegal mining operation at the Mbareke Ameka Mining site of the community without any community Development Agreement (C.D.A).

They relied on several provisions of the Mineral and Mining Act of 2007 which entitle the community to surface right and other entitlements accruable to the community as the original owner or occupier of the land where Mbareke Ameka Mining is situated.

The Plaintiffs cited and relied on the provisions of sections 72, 97-130 which include section 113 of the Act. Counsel to the Plaintiffs maintain that the provisions of section 153 of the Mineral and Mining Act of 1999 which has been repealed does not apply in this case and that similar provision in the current Act does not affect Plaintiffs' civil right as enshrined under section 6(6)(b) of the 1999 Constitution and that section 113(4) of the Act have a recourse to the Plaintiffs' statement of claim.

Counsel refer the court to similar preliminary objection filed by the defendants on the 17th February 2010 alleging lack of

locus standi on the part of the Plaintiffs to institute this action which Counsel argued that had been dismissed by this court. Counsel submitted that this court has therefore become functus officio to determine this application on ground that it cannot sit on appeal against the decision it earlier made in this case on the same issue.

Counsel further submitted that the Defendants' preliminary objection constitute demurrer because the Defendants did not file their statement of defence in this case before filing their preliminary objection. He relied on the provision of order 16 rule 1 of the Rules of this court which states that no demurrer shall be allowed. He went further by submitting that by the provision of order 16 rule 2(1)(2) of the Rules of this court, the Defendants were only entitled to raise their point of law by their pleading i.e their statement of defence.

On the Defendants' Counsel's argument that the counter affidavit of the Plaintiffs deposed to by one Festus Nweke, who is alleged to be one of legal practitioners appearing for the Plaintiffs be discountenanced on ground that a legal practitioner cannot give evidence for his client; Plaintiffs' Counsel submitted that there is no law that forbids or prevent a legal practitioner from deposing to an affidavit on behalf of the party he is appearing for.

Counsel finally urged the court to dismiss the preliminary objection of the Defendants.

I have considered all the argument and submission of Counsel to both parties as ably and brilliantly advanced in their written addresses and as rendered viva-voce in the open court by way of additional submissions. In determining whether a Plaintiff has locus standi to institute an action in court, it is the statement of claim of the Plaintiff that the court looks at. See Adesanoye vs. Adewole (2006) 14 NWLR (pt 1000) 242/(2006) LPELR- 143(SC).

A glance at the Plaintiffs' statement of claim and the amended statement of claim show that the Plaintiffs instituted this suit for themselves and on behalf of the four villages that make up Ameka Community under Ezza South L.G.A. of Ebonyi State. There are several averments in their statement of claim indicating that the suit was initiated in representative capacity as indicated in the title and description of parties in the suit. See paragraphs 1, 2, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Amended statement of claim. The above averments show clearly that this suit is being prosecuted in representative capacity, the 1st and 2nd Plaintiffs only show up as the representatives of Ameka community. It is not the law that members of a family or

Counsel finally urged the court to dismiss the preliminary objection of the Defendants.

I have considered all the argument and submission of Counsel to both parties as ably and brilliantly advanced in their written addresses and as rendered viva-voce in the open court by way of additional submissions. In determining whether a Plaintiff has locus standi to institute an action in court, it is the statement of claim of the Plaintiff that the court looks at. See Adesanoye vs. Adewole (2006) 14 NWLR (pt 1000) 242/(2006) LPELR- 143(SC).

A glance at the Plaintiffs' statement of claim and the amended statement of claim show that the Plaintiffs instituted this suit for themselves and on behalf of the four villages that make up Ameka Community under Ezza South L.G.A. of Ebonyi State. There are several averments in their statement of claim indicating that the suit was initiated in representative capacity as indicated in the title and description of parties in the suit. See paragraphs 1, 2, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Amended statement of claim. The above averments show clearly that this suit is being prosecuted in representative capacity, the 1st and 2nd Plaintiffs only show up as the representatives of Ameka community. It is not the law that members of a family or

community must be specifically named as parties, the law is that the persons representing them must have the same interest i.e common interest and common grievance and when the above are present, a representative action will be in order. The expression on the writ and statement of claim of Plaintiffs that the action is brought in a representative action or capacity is a prima-facie evidence of authority. See Mozi vs. Mbamalu (2006) 15 NWLR (pt. 1003) 466; SPDC (Nig.) Ltd vs. Edamkue & Ors (2009) LPELR-3048 (SC).

The grievance of the Community showing how its alleged rights have been infringed by the Defendants forms the foundation of this action. A critical look at the Plaintiffs' Amended statement of claim or even the original statement of claim show that several paragraphs of the processes contain averments spelling out the Community's grievances and breach of the Plaintiffs' legal rights. See paragraphs 20-38, 46, 49-61, 62(e)(f)(h), 63-70 of the statement of claim.

It is right to say that when an action has been instituted by representatives of a family or community in an appropriate case and facts are pleaded and reliefs are claimed indicating that it is in respect of representative or corporate interest in the subject matter, then the real Plaintiff or Plaintiffs should be seen as the

family or community and not the individuals who have sued in a representative capacity. Such individuals only appear on record as suing for the class, family or the community of which they are members, see Ladejobi vs. Oguntayo (2004) 18 NWLR (pt. 904) 149; (2004) LPELR-1734 (SC).

It is elementary law that in order to determine locus standi of the Plaintiffs, the only court process to look at is the statement of claim, it is the statement of claim that exclusively donate locus standi in a suit. All the avalanche of several affidavit, further affidavit, counter affidavit and further counter affidavit and what have you are just by the way.

In their Amended statement of claim, the Plaintiffs pleaded and claim for the interest of their community, they alleged, they are entitled to surface right or rents. They alleged breach of the rights of the community by the Defendants, they said the community is the original occupier or owner of the land known and called Mbareke Ameka Mining site. They allege denial of the community of payment of surface rent accruable from Mining operation of the 11th Defendant on the Mining site. They allege falsification of consent letter in the name of the community for the selfish interest of Defendants at the expense of the community. They alleged the Defendants caused illegal mining

operation at the Mbareke Ameka Mining site of the community without any Community Development Agreement (C.D.A) and other sundry and numerous allegations as contained in their Amended statement of claim.

The Plaintiffs conceded to the argument of the Defendants that the Federal government of Nigeria by the provision of section 1(1)(2) of the Nigerian Mineral and Mining Act 2007, has power to acquire the property in and control of all the mineral resources on the Mining site, they however maintained that the Act gives the community right to be entitled to surface right and other entitlements accruing to the community as original owner or occupier of the Mining Site.

A glance at the provisions of the Nigerian Mineral and Mining Act 2007 itself show that though the Act gives Federal Government of Nigeria right to acquire the property in the mining site and be in control of all the mineral resources found there. That notwithstanding, the same Act recognizes certain and specific rights and entitlements accruable to the Plaintiffs as the original occupier or owner of the land. There is nowhere in the Act where the host community is prevented from claiming such rights or entitlements freely donated and spelt out in the Act.

Section 116 of the Act clearly mandate a holder of mining lease or a licensee to enter into a Community Development Agreement with the host community before commencing exploration or mining operation on any land. That the Community Development Agreement should address the interests of the community on issues like educational scholarship, apprenticeship, technical training, employment opportunities for members and indigenes of the community, undertaking by the Mining company or licensee to the community on provision of social and economic contributions to sustain the community, financial or other forms of contributory support for infrastructural development and maintenance of the community such as education, health, road, water, power and other community services.

Section 117 of the Act gives the host community rights to participate in planning, implementation, management and monitoring of activities carried out under the C.D.A (Community Development Agreement). Section 125 of the Act makes it obligatory for a licensee or lessee to pay compensation to the owner or occupier of land or person having interest in the land who is injuriously affected by exercise of exploration rights conferred on the licensee or lessee.

Section 164 of the Act even permit or endorse group action or persons representing themselves in claim for rent or damage payable over a land as they may be entitled to as lawful occupiers.

Section 3(1)(c) of the Act exclude lands used as ancestral, sacred or archaeological site from exploration or mining activities in recognition of the host community's rights and interests.

Section 72 of the Act permits or grants right to the original owner or occupier to retain the right to graze live stock or cultivate the surface of the land provided their activities do not interfere with mining operations.

Section 98 of the Act prohibits mineral exploration in area held to be sacred by the community and also forbid injury or destruction being done to tree or others object or veneration. Under this section, a community retains the right to claim for compensation from any licensee or lessee who causes injury or damage to such area, tree or thing or object which a community hold to be of veneration.

Section 99 of the Act protects the rights of members of the host community to personal use of extracted sand, clay, laterite and stone in accordance with their local custom.

One can go on and on like that to identify those rights and entitlements which the Act itself has retained and donated to the host community. Can one then say that if any of these rights are breached to the detriment of the community, the community will not be entitled to claim for remedy?, the answer is an emphatic No!

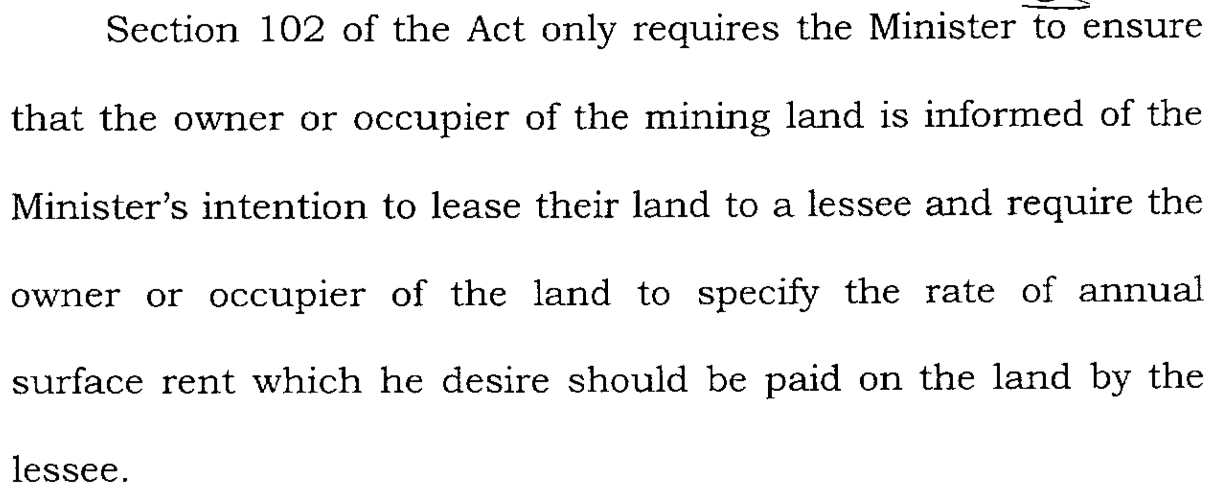
It is clear from the averments in the statement of claim of the Plaintiffs, that their complaints and grievance relate to breach of some of the rights and entitlements spelt under the Act, see paragraphs 29, 30, 31, 32, 33, 34, 36, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62(e)(f), 63, 65, 67, 68, 69, 70. See also Reliefs a, b, d, e, g, h, i and j of the Plaintiffs' statement of claim.

The Defendants' Counsel in their written submission, stated that the Plaintiffs fail to show evidence that they own the surface right of the Mining site and that they fail to show that they are the beneficial owners of royalty accruable to the entire community as a result of mining at the Mbareke mining site; it must be said that evidence to prove such averments can only be placed before the court if any at the hearing of the case. not at the stage of hearing preliminary objection.

With respect to the provisions of sections 102, 113 and 153 of the Act which the Defendants' counsel place reliance on, I have

gone through those sections of the Act. Section 153 of the Mineral and Mining Act 1999 which empowers the Attorney General of the Federation to institute criminal proceedings against any person alleged to have committed offence under the Act is not applicable to the present case because the section does not prevent institution of civil actions by host community against a Mining company and others working with them who have breached their rights.

Further to the above, the Mineral and Mining Act 1999 has been repealed by section 161 of the Mineral and Mining Act of 2007.



Section 102 of the Act only requires the Minister to ensure that the owner or occupier of the mining land is informed of the Minister's intention to lease their land to a lessee and require the owner or occupier of the land to specify the rate of annual surface rent which he desire should be paid on the land by the lessee.

The section cannot be said to have created any condition precedent, non-fulfillment of which could constitute a set back to the Plaintiffs' present suit.

What is more, by the provision of section 113(4) of the Act, it gives any person rights of action to proceed to court for redress when such person is alleged to have suffered any damage, loss or disturbance of his right by reason of the operation of Chapter 4 of the Act and shall be entitled to payment of compensation thereon.

By the provision of section 113(4) of the Act, the institution of the Plaintiffs' suit enjoys the spirit of the Act and cannot be said to have contravened any of the provisions of the Act.

Moreover, even from the affidavit in support of Defendants' preliminary objection, there are several depositions therein pointing to the fact that there are issues to be resolved between the community and the Defendants. See paragraphs 20 – 28 of the Plaintiffs' statement of claim, paragraphs 18 – 22 of the Defendants' affidavit in support of the preliminary objection, paragraphs 20 – 23 of the Plaintiffs' counter affidavit.

In paragraphs 8 and 9 of the affidavit in support of the preliminary objection, the Defendants admitted that the community own Mbareke Mining site and that the community comprise of four villages and by paragraph 15 of the Defendants' further affidavit in support of the preliminary objection, the Defendants admitted that the 11th Defendant carried out mining

activity at the said Mining site. The Act gives the community the right to enter into Community Development Agreement (CDA) with licensee or lessee on the mining site. This is one of the grievances of the Plaintiffs in the present case.

The Defendants' Counsel argued that relief C of the Plaintiffs is outside the provision of section 251(1) of the constitution as same according to Counsel relate to the issue of title to land thereby depriving this court jurisdiction to entertain this suit. I have gone through the averments and reliefs in the Plaintiffs' statement of claim over again.

This court is nowhere being asked or called upon to determine the issue of title to land. A community reading of the 70 paragraph averments in the said statement of claim or Amended statement of claim show that the case, claim and reliefs of the Plaintiffs are hugely and largely mining related. All other averments touching on the activities of the Defendants are to drive home the grievance of the Plaintiffs on the alleged breach of their rights, over the operation of the Mbareke Mining site.

By the provision of section 251(1)(n) of the constitution, this court is the only court clothed and blessed with the exclusive jurisdiction of adjudicating over causes and matters relating to or connecting with mining and related matters. See <u>NNPC & Anor</u>

vs. Orhiowasele & Ors (2013) LPELR – 20341(SC). This court but no other court with emphasis, is the appropriate forum or court for issues of mining and related matters. The question to ask is that if this court decides to close its door from the Plaintiffs, on ground of lack of jurisdiction which other court of first instance will they go, is it the State High Court, or the National Industrial Court or the Customary Court of Appeal? Therefore, the appropriateness of the institution of the present case before this court cannot be over emphasized.

It is settled law that in ascertaining the competence of a suit, the determining factor is the Plaintiffs' claim. On this question however, it is not the manner in which the claim is couched that matters nor is the categorization given to the claim by the Defendant that counts. The court has a duty to carefully examine the reliefs claimed to ascertain what the claim is all about. See WAEC vs. Akinkunmi (2008) 9 NWLR (pt 1091) 151 (SC)/LPELR – 3468 (SC).

Going further, the Defendants filed their preliminary objection pursuant to the provision of order 16 rule 4 of the Rules of this court in clear breach of the provision of rule 1 of the said order which prohibit demurrer procedure. The Defendants' Counsel had courageously admitted in his written submission

that demurrer has been abolished under the various Rules of courts only to attempt to de-emphasize the essence of the abolition of the procedure as provided under order 16 rule 1 of the Rules of this court.

The Supreme Court has re-emphasized the need by a Defendant who is challenging the capacity of a Plaintiff to sue or locus standi of a party to file his statement of defence in the case of Disu & Ors vs. Ajilowura (2006) LPELR - 955 (SC); (2006) 7 (SC) (Pt 11) P. 1 at pp. 18-19 paragraphs G-A. When it was held as follows:

> *"In a case where the opponent is challenging the capacity of a party to sue i.e its locus, as in this case, a statement of defence is very necessary. I think even if it is not so provided in the rules of the High Court, common sense dictates that a statement of defence should be filed in order to assist the court in deciding the competence of the case before the court for the consequence of striking out a suit may be grave on a Plaintiff".*

Furthermore, in page 27 paragraph D of the Judgment, the Supreme Court went on;

> *"There is no doubt, demurrer proceeding have been abolished in view of the clear provision of order 23 rules 1 of the High Court Civil Procedure rules of Lagos state.*

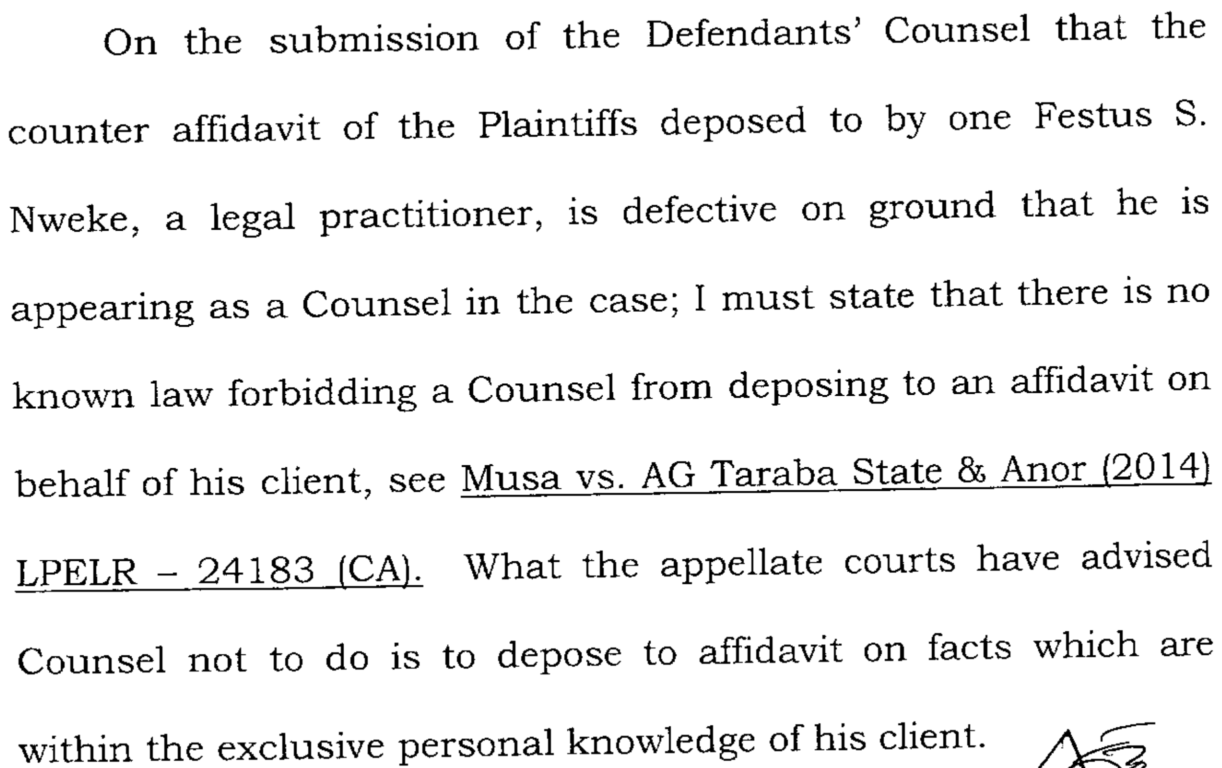
I think it is settled that the issue of locus standi or jurisdiction being a point of law cannot properly be raised under order 23 rule 4 as was done by the appellants in this case".

Note that the provisions of order 23 rules 1 and 4 of Lagos High Court Rules are in pari-materia with order 16 Rules 1 and 4 of the Rules of this Court.

It is to be noted that demurrer was provided under the old rules of this Court of 1976 as a device used in maritime Industry to enable party to litigation to short circuit on otherwise what would have been a lengthy trial by raising an important defence which would have the effect of disposing of the case. The procedure is referred to as peremptory defence which is hugely based on the defence built on the provision of the law, meaning that the defendant is not controverting the averment in the statement. That is why the defendant does not to file statement of defence.

It is to be reiterated that the procedure has become archaic and ultimately scrapped, see the supreme Court decision in JFS Inv. Ltd vs. Brawal Line Ltd (2010) 18 NWLR (pt 1225) 495 (SC)/(2010) LPELR-1610 (SC).

On the submission of the Defendants' Counsel that the counter affidavit of the Plaintiffs deposed to by one Festus S. Nweke, a legal practitioner, is defective on ground that he is appearing as a Counsel in the case; I must state that there is no known law forbidding a Counsel from deposing to an affidavit on behalf of his client, see <u>Musa vs. AG Taraba State & Anor (2014) LPELR – 24183 (CA).</u> What the appellate courts have advised Counsel not to do is to depose to affidavit on facts which are within the exclusive personal knowledge of his client.



This does not apply in the present case as the said deponent, though a legal practitioner, is a native of the Plaintiffs' community holding the position of an assistant legal Adviser of the Community Town Union called Ameka Development Union as disclosed to in his depositions. The defendants unequivocally admitted the fact that the said deponent is a member and native of the Plaintiffs' community. His counter affidavit is therefore not defective by reason of his being a Counsel in the matter.

On the argument and submission of Plaintiffs' Counsel that this court is functus officio over this preliminary objection on ground that a similar application filed by the defendants bordering on the same issue of locus on the 17th February 2010 had been heard and determined by this court.

I have gone through the records of this court many times, the record of the court does not show that the said preliminary objection has been heard or determined by this court. In the circumstance, I hold that this court is not functus officio over this present preliminary objection.

In conclusion, it is the law that in an action initiated in a representative capacity, by the plaintiff, in order to deprive the plaintiffs of their representative capacity, there must be proof of substantial opposition to the suit by the persons on behalf of whom the action has been brought, see Ladejobi vs. Oguntayo (supra).

There is no such substantial opposition in the present case. There is no evidence of disapproval of the suit by the entire members of Ameka Community or substantial membership or inhabitants of the Community. The only persons opposing this suit are the defendants against whom the suit was filed. This is expected, if the defendants are not going to be taken as having conceded to the plaintiffs' suit or claims. The defendants' opposition against the suit is more like their defence to the action. It cannot by any stretch of imagination be described as opposition by the entire Ameka Community. There is no such proof or evidence of minutes of meeting showing deliberations of

members of the community where they opposed the plaintiffs' suit. Most of the depositions contained in the defendants' affidavit and further affidavit in support of the preliminary objection are supposed to be averments in their statement of defence which they are yet to file.

In sum total of it all, the only issue in this preliminary objection formulated by the defendants and adopted by the plaintiffs i.e whether the plaintiffs have capacity to institute this suit, is hereby resolved in favour of the plaintiffs and against the defendants.

I hold that the plaintiffs as shown by the averments and reliefs in their Amended statement of claim filed on the 11th day of June 2013 and deemed as properly filed on the 16th day of June 2014 have locus standi or capacity cognizable under the law to have instituted this suit.

Let it be known however that my holding in this decision is by no means stating that the plaintiffs' claims and reliefs are of merit in this case. We have not got to that stage, but it is by all means stating that they have the requisite legal right, cognizable capacity and standing to initiate this suit in representative capacity on behalf of Ameka community in Ezza south L.G.A of Ebonyi State.

Before concluding this ruling, let me state clearly and I must confess that I am thoroughly thrilled and extremely impressed by the argument, submissions and professional exhibition of both counsel on either sides of the divide, I have made frantic efforts and warned myself very seriously not to be tempted to be swaged on the surface and this has led me to critically examine the processes before me in this case particularly the plaintiffs' Amended statement of claim.

Consequent upon the above, I hold that the preliminary objection of the defendants dated 12th day of April, filed on the 13th day of April 2016 and the one earlier filed by the defendants dated 17th day of February 2010 since they are the same in substance, form, fact and grounds and since they constitute abuse of the process of this court altogether are lacking in merit and substance and they are hereby dismissed.

I hold that this court possess the requisite jurisdiction to adjudicate over this case.

I award cost in the sum of N100, 000 against the defendants and in favour of the plaintiffs.

HON. JUSTICE AKINTAYO ALUKO
PRESIDING JUDGE
6 – 12- 2016

ENDORSEMENT:

PRELIMINARY OBJECTION
WAS ARGUED BY;

(1) C.E.C NWAGBAGA Esq. with
S. O. OBASI Esq. holding the
brief of C. A. AIYAMEKHUE Esq. for the
Plaintiffs/Respondents.

(2) C.N. MGBADA Esq. for the Defendants/
Applicants.