

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY, THE 24TH DAY OF APRIL, 2017
BEFORE HIS LORDSHIP, THE HON. JUSTICE G.O. KOLAWOLE
JUDGE

SUIT NO: FHC/ABJ/CS/245/2015

BETWEEN:

- | | | |
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| <ol style="list-style-type: none">1. CHIEF NKEREUWEM UDOFIA AKPAN2. NKEMJIKA CHISOM OZOUDE3. NSIKAN-ABASI GIDEON NKEREUWEM
<i>(Suing through his Next Friend Chief
Nkereuwem Udofia Akpan)</i> | } | PLAINTIFFS/
APPLICANTS |
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BRITISH AIRWAYS :::::::::::::: DEFENDANT/RESPONDENT

RULING

On 13/2/17, I listened to the arguments of Counsel in respect of the Plaintiffs' Motion on Notice dated 1/2/17 and filed on 2/2/17. By the said Motion on Notice, the Plaintiffs seek for: 1. "**LEAVE** of the Honourable Court to set aside the Subpoena dated 2nd day of November, 2016"; 2. "**AN ORDER** striking out/setting aside the Subpoena dated 2nd day of November, 2016"; and 3. "Such

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further and or other Orders as this Honourable Court may deem fit, just and equitable to make in the circumstances".

These prayers are predicated on 12 grounds which the Plaintiffs' Counsel highlighted on the face of the Motion on Notice, the grounds are:

1. *"The application for and issuance of subpoena against the 2nd Plaintiff was an abuse of process and an after-thought meant to delay the trial".*
2. *"Pleadings in this suit were long settled on the 28th June, 2016 when the Defendant filed and served their Statement of Defence"*
3. *"Defendants' "List of Witness" before the Court dated 25th June, 2016 and filed 28th June, 2016 contains only one Ms Juliet Ihiabe".*
4. *"Parties are bound by their pleadings and the statement of defence dated 25th day of June, 2016 and filed on the 28th day of June, 2016 made no mention of any intention to subpoena any other person, the 2nd Plaintiff or at all".*
5. *"The 2nd Plaintiff, who is nursing a set of twins, now resides and works in the United States of America and would take great expense to travel down for the trial".*

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6. *"Defendant has not brought in her staff at London Heathrow who were the principal actors/witnesses to the subject matter of complaint but seek to bring in the 2nd Plaintiff".*
7. *"The essence of pleadings and indeed the front loading approach is to put a party on notice of the case he intends to meet in Court".*
8. *"The Honourable Court was misled to issue the subpoena by Defendant's Counsel five months after pleadings were settled and such an application can only be made by Motion on Notice seeking leave to amend the statement of defence".*
9. *"Parties cannot spring surprises on opponent during trial".*
10. *"The only option open to a party seeking to amend his pleadings and or introduce a new dimension to the case is to come by way of Motion on Notice".*
11. *"By the rules of Court the said subpoena is incompetent and ought to be truck out".*
12. *"This Honourable Court has the jurisdiction to grant the reliefs sought in this application".*

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The said Motion on Notice is supported by a 37 paragraph affidavit which the 1st Plaintiff as his own Counsel and Counsel for the 2nd & 3rd Plaintiffs deposed to personally.

The Motion on Notice was argued in a written address dated 1/2/17 and filed on 2/2/17. The Plaintiffs' written address argued nine (9) issues, and I was considering whether the issues were meant to argue each of the 37 paragraphs of the affidavit filed! Issues are meant to be distilled from a holistic consideration and assessment of the case being put forward. Where a Motion on Notice with only two (2) substantive prayers have nine (9) issues set down for argument, it is evident that the address was not properly settled or not settled based on a firm understanding of what are the crucial issues which should form the basis of the Court's decision.

On issue one, the Plaintiffs through the 1st Plaintiff as their Counsel, argued that the issuance of the subpoena on the 2nd Plaintiff was unnecessary because, it was intended to delay the trial as the documents which the Defendant seek to tender through the 2nd Plaintiff has been tendered by the 1st Plaintiff. The Plaintiffs listed other reasons why the Court should not have sanctioned the issuance of the subpoena which was attached as

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Exhibit "A" to the instant Motion on Notice. The subpoena is dated 2/11/16.

Issue 2 deals with the pleadings filed by both parties and which was used to argue that the pleadings were long settled by both parties before the *Subpoena Duces Tecum* was applied for by the Defendant.


Issue 3 was used to canvass arguments that the List of Witnesses cannot be amended without a formal application to do so. While issue 4 was used to argue that the Defendant is "*bound by their pleadings*". Issue 5 argues the reasonability or otherwise of the 2nd Plaintiff who is "*nursing a set of twins*" and who resides in the United States of America to travel down for trial of this case at her own expense. The Plaintiffs argue issue six on the fact that the Court was misled to issue the subpoena five months after the parties have settled their pleadings. Issue 7 argues that the said subpoena issued was incompetent and issue 8 argues that the subpoena so issued was an abuse of the Court's process. On issue 9, the Plaintiffs argued that this Court has jurisdiction to grant the prayers being sought. It is my view that the mode and style of the Plaintiffs' address is such that I find uncomfortable to judicially review. I have said this because, having regard to the prayers being sought, the grant or refusal of any of these prayers

entails the exercise of the Court's discretionary powers. It is a jurisdiction to be exercised based on the materials placed before the Court and is to be exercised, not only on the peculiar facts and circumstances of this case which the Plaintiffs' address is required to emphasize, but it must be done in the over-all interest of justice to both parties. The Plaintiffs' address, without the need to split up its issues into fragments of nine (9) issues – which really are not directed at the prayers sought should have on concrete terms be modeled on these judicial templates.

The Defendant did not file any Counter-Affidavit to the Plaintiffs' Motion on Notice, but its Counsel, Basseyy Attoe, ESq. was heard orally in opposition to the Plaintiffs' Motion on Notice.

The Defendant's Counsel began his submissions by drawing attention to certain paragraphs of the Plaintiffs' affidavit in support of their Motion on Notice which he contended, contravened the provision of Section 115 (2) of the **Evidence Act**, supra. The paragraphs he has fingered are paragraphs 13, 14, 17, 18, 29, 30, 33, 34 and 35. He also drew the Court's attention to paragraphs 7, 8, 9, 10 and 11 of the Affidavit filed in support. Literarily, almost the entire 37 paragraphs of the affidavit filed, were "*adjudged*" by the Defendant's Counsel as

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violating the provision of Section 115 (2) of the **Evidence Act**, supra.

The Defendant's Counsel argued that the address of the 2nd Plaintiff on the Court's processes filed, is in Abuja. On the argument that the application for subpoena should have been made by way of a formal application, the Defendant Counsel referred the Court to the provision of Order 20 Rule 8 of the **Federal High Court Rules, 2009**. It was submitted, that the application for Subpoena had been made before the Defendant opened its defence.

On the arguments made by the Plaintiffs, that both parties had front loaded their processes, the Defendant's Counsel submitted that the 2nd Plaintiff was requested to "*produce her hospital report to back up her claims for N1 Billion as damages for injuries*". He submitted that this "*issue is not extraneous, strange to the Plaintiffs*", and that the issue of "*being taken by surprise goes to no issue*".

On the issue of expense which the 2nd Plaintiff will incur in obedience to the subpoena issued by the Defendant, it was argued that "*it was an afterthought*" and that "*the Plaintiff has not in any way given the 2nd Plaintiff's address in the United*

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States of America'. The Court was urged to hold that the 2nd Plaintiff is in contempt of Court.

The 1st Plaintiff who appears as his own Counsel in his Reply on Points of law, argued that the paragraphs of his deposition which the Defendant's Counsel contended that they contravened the provision of Section 115 (2) of the **Evidence Act**, submitted that "*they are in line with the Evidence Act*".

Secondly, he submitted that the fact of the 2nd Plaintiff's residence "*cannot be countered orally except by a Counter-Affidavit*". He submitted that the case law cited by the Defendant's Counsel are inapplicable and argued that the 2nd Plaintiff's address is contained in the receipts issued to her.

After both parties concluded their oral arguments, I reserved the Ruling till 30/3/17. I advisedly did so because, it is a rare application to determine in which the Court is urged to set aside a subpoena it had issued on a witness for any of the parties to a dispute. However, on 30/3/17, I couldn't deliver this Ruling because, I was attending a seminar in Abuja on Anti-Corruption Strategy organized by the European Union in collaboration with the United Nations Office on Drugs and Crime and the National Judicial Institute. I consequently advised the Registrar to

reschedule the Ruling till today in view of the Easter vacation that was close by.

I had in the course of reviewing the Plaintiffs' Motion on Notice expressed certain remarks in relation to the submissions made. By my assessment, the Plaintiffs' Motion on Notice is one which as I had earlier remarked, invokes the equitable jurisdiction of this Court. This entails the exercise of the Court's discretionary powers which as in all such exercises, must be done judicially and judiciously, and based on the materials placed before the Court. Apart from the materials placed by both parties, it's a discretion which the Court is required to exercise with great judicial circumspection and to have due regard to the peculiar facts and circumstances of the case. In all of these, the Court must remain focused on the interest of justice – which is a multidimensional concept.

In terms of materials placed before the Court, the Defendant who has not filed a Counter-Affidavit can hardly be heard orally to contradict depositions which the Plaintiff have averred in the Affidavit in support of their Motion on Notice. The best which the Defendant can do, is the limited, perhaps the narrow path which Basseyy Attoe, Esq. has treaded on the issue which he raised on the paragraphs of the Plaintiffs' affidavit in support of their Motion

on Notice. When I read through the Plaintiffs' affidavit which was deposed to by the 1st Plaintiff – who by virtue of Section 122 (2) (j) of the **Evidence Act**, supra, I take judicial notice of as a legal practitioner apart from his saying so in the introduction paragraph of the said affidavit, some of the paragraphs are a mixed grill that will require a rather delicate "*judicial surgery*" in order to sever the part that contravened the provision of Section 115 (2) of the **Evidence Act**, supra. from those that are not. Secondly, when a litigant who is also a lawyer, acts for himself, it is not unlikely that his personal emotion gets on the way in preparation of such a Court's process.

As far as I am concerned, there are substantial issues which I need to deal with than to expend my time and energy in separating the "*wheat from the chaffs*" in relation to which of the paragraphs of the affidavit or part of them that offend or tend to offend the provision of Section 115 (2) of the **Evidence Act**. My focus is on being able to do substantial justice between both parties.

The subpoena dated 2/11/16 issued on 2nd Plaintiff to attend the Court's proceedings on behalf of the Defendant is simply one meant to tender documents without more. It's a "*Subpoena Duces Tecum*" and not one by which the 2nd Plaintiff will be

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required to testify, i.e. "*Subpoena ad Testificandum*". The documents which the 2nd Plaintiff will be required to tender as a Defendant's witness have been listed on the face of the "*Subpoena Duces Tecum*". They are: 1. "*MEDICAL REPORT FROM THE TUFTS MEDICAL CENTRE, P.O. BOX 28298 NEW YORK, NY 10087 – 8298 indicating the NATURE OF THE TREATMENT YOU RECEIVED in that hospital between the 11th October, 2013, to December, 2013*"; 2. "*MEDICAL REPORT FROM THE BROCKTON HOSPITAL, United States of America, indicating the NATURE OF THE TREATMENT YOUR RECEIVED in that hospital between 2nd October, 2013 to 11th October, 2013*". (Underline is mine for emphasis).

These are documents which the Court in the exercise of its judicial discretion, needs to weigh and assess vis-à-vis the Plaintiffs' claims and the line of the Defendant's Statement of Defence in order to come to a decision whether or not, the request of the Defendant by the subpoena is made bonafide or not.

In the course of the trial, the Plaintiffs through PW 1, had tendered, and without any objection by the Defendant's Counsel, certain documents relating to payments made in the United States of America. They were admitted as Exhibits "B3"; "B4";

"B5"; "B6" and "C"; "C1"; "C2"; "C3" and "C4". Each of these exhibits either contains specific amounts of money paid and or in others, indicates the medical or such services for which the payments were meant for.

When these exhibits are read, the next material which the Court can justifiably look at (Refer to **HALSBURY'S LAW OF ENGLAND**, 4th Ed. Vol. 17, Page 74 @ Para 102 in the inherent power of every superior Court of record to look at its record and take cognizance of processes and documents in it) is the Plaintiffs' claims as endorsed on the Writ of Summons filed. The said claims reads:

- (a) *"A Declaration that there was a valid and enforceable contract between the Plaintiffs and Defendants to transport all three from the Nnamdi Azikiwe International Airport Abuja to the Logans International Airport in Boston Massachusetts United States of America on 3rd October, 2013".*
- (b) *"A Declaration that Defendants were in breach of contract with Plaintiffs' when the 3rd Plaintiff was prevented from boarding the Defendants' Boston bound Aircraft at Heathrow on 3rd of October, 2013".*

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(c) "A Declaration that it was fraudulent for Defendants to extort sum of US\$896.00 from Plaintiffs as additional Ticketing fees at London".

(d) "SPECIAL DAMAGES as follows:

- US\$896.00 additional fees extorted from Plaintiffs October 3^d 2013.*
- \$2,257.68 to Brockton emergency services hospital medical bills.*
- \$260 physician bill for emergency services at Brockton Hospital.*
- \$83 bill for emergency radiology at Brockton Hospital.*
- \$1,031 ambulance cost from Brockton Hospital to Tufts 11, October, 2013.*
- \$1,046 to Tufts physicians as hares for emergency treatment for 2nd Plaintiff.*
- \$1127 to Tufts Medical Hospital fees for emergency ward treatment for 2nd Plaintiff.*
- \$3,926.76 Tufts Medical fees of November 16 2013".*

(e) "An Order of Perpetual Injunction restraining the Defendant either of himself or through his privies, agents

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and assigns from using abusive, racists and insulting language on Plaintiffs howsoever”.

- (f) *“Such exemplary and or punitive damages as the Honourable Court may deem fit just and equitable to make in the circumstances of this case”.*
- (g) *“**General Damages** in the sum of N1,000,000,000 (One Billion Naira) only against the Defendant for psychological trauma, racist profiling and injury suffered due to the conduct of the Defendant agents”.*
- (h) *“Cost of this proceedings assessed at N5,000,000 (Five Million Naira)”.*
- (i) *“Such further and or other orders as the Court may deem fit to make”.*

Reading these reliefs, it is of particular interest, by my assessment for the determination of the Plaintiffs’ Motion on Notice and the Defendant’s Subpoena dated 2/11/16 are reliefs (c) and (d) as reproduced.

The question which logically arises, is in what way(s) will the attendance of the 2nd Plaintiff as a witness for the Defendant to tender the two (2) documents listed in the Subpoena dated 2/11/16 advance the course of justice on behalf of the Defendant who by the Subpoena, would want the 2nd Plaintiff to produce the

two (2) medical reports which I had earlier reproduced. The claims of the Plaintiffs, *prima facie* relate to alleged payments which they made in consequence of the purported breach of the Defendant's obligations as encapsulated in reliefs (a) & (b) endorsed on the Writ of Summons. The issue as to the "*nature of the treatment*" the 2nd Plaintiff received at the Tufts Medical Centre and the Brockton Hospital both in the United States of America was not a core issue in dispute but the sums allegedly incurred and paid for by the Plaintiffs for the treatment of the 2nd Plaintiff.

In the light of this analysis, it is my view that the "*Subpoena Duces Tecum*" by which the 2nd Plaintiff was required to attend the Court and tender the two (2) listed documents – which requires the Plaintiffs to indicate the "*nature of the treatment*" which the 2nd Plaintiff received, and which perhaps led to the payments of the sums itemized in reliefs (c) and (d) and which the Plaintiffs endeavoured, if the Court accepts their evidence as cogent and probable, to prove by Exhibits "B3"; "B4"; "B5"; "B6" and the series of Exhibits "C"; "C1"; "C2"; "C3" and "C4" is in my view, not an application made by the Defendant in good faith. The "*nature of the treatment*" which the 2nd Plaintiff received as evidenced by these documentary exhibits is not in issue, but the

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sums paid which are being claimed as items of "*Special Damages*" as depicted in the endorsed reliefs which I have reproduced. In any event, and as I had earlier observed, some of the documentary exhibits actually state the "*services*" or "*purposes*" for which the respective payments were made for. The Plaintiffs' Motion on Notice dated 1/2/17 and filed on 2/2/12 ought in my view to succeed. The "*Subpoena Duces Tecum*" dated 2/11/16 which the Defendant has not proved to have been personally served on the 2nd Plaintiff is hereby set aside.

I was initially minded to refuse the Plaintiffs' Motion in the event that I can order the Defendant who wanted the 2nd Plaintiff to attend the Court's proceedings in order to tender the two (2) documents **PROVIDED** the Defendant will undertake to bear the travel expenses of the 2nd Plaintiff and the set of twins she is said to be nursing. But when I *clinically* examine the "*Subpoena Duces Tecum*" – which even if it is upheld, the Defendant cannot, by the provision of Section 219 of the **Evidence Act, 2011**, ask or cross examine her on any question as a "*witness*" because, the warrant only empowers her to *produce* the said documents, I find that granting such indulgence against this analysis which I have made, will occasion not only great inconvenience to the 2nd Plaintiff, who has not been proved to have been *personally served* with the

Subpoena Ducus Tecum attached as Exhibit "A" to the Plaintiffs' Motion on Notice dated 1/2/17, but it will *collaterally* serve as a tool at the instance of the Defendant who did not object to the admissibility of the exhibits which I have mentioned, to delay the conclusion of this suit in which both parties have called their nominated witnesses based on their respective pleadings and witnesses' statements on oath.

The Plaintiffs' Motion on Notice dated 1/2/17 and filed on 2/2/17 succeeds as prayed.

The Defendant may, if it has such documents which it's *Subpoena Duces Tecum* has requested the 2nd Plaintiff to produce, tender it and let the case be put to a close so that final written addresses can be ordered.

This shall be the Ruling of this Court.



HON. JUSTICE G.O. KOLAWOLE
JUDGE
24/4/2017

COUNSEL'S REPRESENTATION

CHIEF N. U. AKPAN appears for himself and the Other Plaintiffs.

BASSEY ATTOE, ESQ. for the Defendant.