

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON TUESDAY, THE 1ST DAY OF MARCH 2016
BEFORE THE HON. JUSTICE A. R. MOHAMMED
JUDGE

SUIT NO: FHC/ABJ/CS/259/2013

BETWEEN:

- 1. HON. BARRISTER ENYINNA ONUGBU**
- 2. HON. CHIEF (MRS) RUBY EMELE**
[For themselves and on behalf of the members
of the Imo State Chapter, Association of
Local government of Nigeria (ALGON)]

PLAINTIFFS

AND

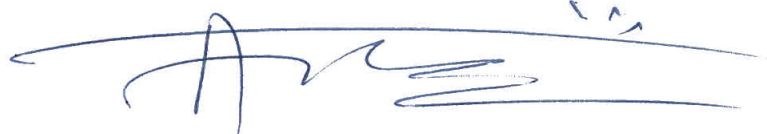
- 1. ATTORNEY GENERAL OF THE FEDERATION**
- 2. ATTORNEY GENERAL OF IMO STATE**
- 3. GOVERNMENT OF IMO STATE OF NIGERIA**
- 4. MINISTER OF FINANCE**

DEFENDANTS

RULING

This ruling is on whether the Court should strike out this suit or dismiss same upon the Notice of discontinuance dated 17/6/15 filed by the Plaintiffs seeking to wholly discontinue this suit against the defendants.

Learned 1st defendant's counsel contended that since the 1st defendant has filed Notice of preliminary objection challenging the jurisdiction of the Court and also filed counter affidavit, then the proper order to be made upon the Plaintiffs' Notice of discontinuance is to dismiss the suit because issues have been joined.

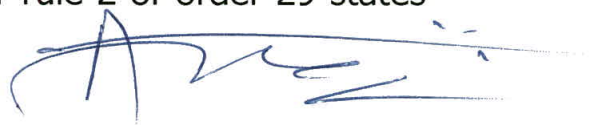


On their part, the 2nd and 3rd defendants through their counsel adopted the contention of the learned 1st defendant's counsel and added that in

view of the counter affidavit filed by them, issues have been joined and the suit having been adjourned severally, should be dismissed.

In his reply, learned Plaintiffs' counsel stated that the 2nd, 3rd and 4th defendants have not file their memorandum of appearance to the Plaintiffs' originating summons, they have no basis to ask for the dismissal of the suit.

I have read the processes filed by the 2nd and 3rd defendants but I am unable to see where the 2nd and 3rd defendants have entered conditional appearance to indicate that they are appearing in protest and wish to challenge jurisdiction of the Court to entertain this suit. Order 29 rule 1 of the Federal High Court Rules, 2009 is the provision that permits a defendant to file application challenging jurisdiction of the Court to entertain a matter brought before it. However rule 2 of order 29 states thus:

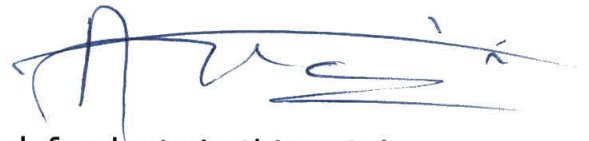


“A defendant making such application must file along with the application a memorandum of appearance stating that he is appearing conditionally”.

It can be seen from the provision of order 29 rule 2 of the Federal High Court Rules, 2009 reproduced above, that while the right to challenge jurisdiction of the Court is available to a defendant, such defendant is required to first file memorandum of conditional appearance to the suit. The implication of a provision like order 29 rule 2 is that compliance with the said provision is a condition precedent to the challenge of the Court's jurisdiction. With regards to this procedure, particularly in an action commenced by originating summons, the Supreme Court per Katsina-Alu

Jsc (as he then was), in the case of INAKOJU VS ADELEKE (2007)4 NWLR PART 1025 page 423 at page 658, paragraphs D – E, held thus:

“This action I have already indicated, was commenced by way of originating Summons. This is a procedure which is used in cases where the facts are not in dispute or there is no likelihood of their being in dispute. The rules demand that a defendant served with an originating summons must enter appearance. This is more so if he wishes to contest the jurisdiction of the Court. Where therefore the defendant wishes to contest the jurisdiction of the Court, he shall enter a conditional appearance. When he has done so, he should promptly and without taking any further step in the proceedings, raise his objection against the jurisdiction of the trial Court”



As stated earlier, none of the 2nd, 3rd and 4th defendants in this suit has complied with the requirement of filing a conditional memorandum of appearance as encapsulated in order 29 rule 2 of the Federal High Court Rules, 2009 before bringing their Notices of objection. Even the memorandum of appearance filed by the 1st defendant on 13/6/2013 does not comply with the requirement of order 29 rule 2, because it is not a conditional memorandum of appearance. The 1st defendant's memorandum of appearance is a normal memorandum of appearance which has not indicated that the 1st defendant wishes to challenge the jurisdiction of the Court.

Similarly, in pages 658 – 659 paragraphs H – A of the case of INAKOJU VS ADELEKE Supra, his lordship Katsina-Alu Jsc (as he then was) further held thus:

“As I have stated earlier, in order for the defendants to be heard, they must first enter appearance. That being so, I am in complete agreement with learned counsel for the Plaintiffs that the defendants were not properly before the Court”.

Having not complied with the provision of order 29 rule 2 of the Federal High Court Rules, 2009, the implication is that none of the defendants is properly before the Court as far as their Notices of preliminary Objection are concerned.



On the contention of the defendants that since they have filed counter affidavits to the Plaintiffs' originating summons, then issues have been joined necessitating the dismissal of this suit, let me observe that by not withdrawing their Notices of preliminary objections, they cannot have recourse to their counter affidavit to seek an order of dismissal of the suit. What I am saying, in effect, is, if what is before the Court is only the defendants' counter affidavits, without any Notice of preliminary objection, then perhaps, the defendants could advance that argument.

On reference to an earlier ruling of this Court in suit No: FHC/ABJ/CS/679/12 NAIC VS FIRST BANK PLC by the 2nd and 3rd defendants' counsel in which he said this Court had dismissed that suit instead of striking it out, I wish to state that the situation in the NAIC VS FIRST BANK PLC case is not on all fours with the present suit. This is because a distinguishing feature in that case is that there was no contention in the NAIC VS FIRST PLC case to the effect that the defendant

did not file conditional memorandum of appearance before filing Notice of preliminary objection. If there was such contention on the issue, the Court would have made a pronouncement on that issue just as is being done in the present case. In effect, none of the parties in the NAIC VS FIRST BANK case raised the issue of non-compliance with order 29 rule 2 of the Federal High Court Rules, 2009 to enable the Court give its opinion on the issue.

In consequence of the above finding, I am of the humble view that since the defendants herein have not complied with the clear and unambiguous requirement in order 29 rule 2 of the Rules of this Court, they cannot seek the dismissal of the Plaintiffs' suit pursuant to the Notice of Discontinuance filed on 17/6/15. On the whole, I accept the Notice of Discontinuance dated 17/6/15 filed by the Plaintiffs to discontinue this suit.

In view of the plaintiffs' Notice of Discontinuance dated 17/6/15 but filed on 18/6/15, this suit is accordingly struck out.



HON. JUSTICE A. R. MOHAMMED
JUDGE
1/3/2016

APPEARANCE

Julius Arop Esq for the 1st Defendant.