IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON WEDNESDAY 31ST DAY OF MARCH, 2021
BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS
MOTION NO: FCT/HC/M/12410/20

BETWEEN:

1. **LAWRENCE KARENGET CHEMONGE**
2. **MARY ADIE CHEMONGE** } **..... APPLICANTS**

AND

OLUMILADE AYINDE ADELAKUN..... RESPONDENT

JUDGMENT

This suit was commenced by an originating motion brought pursuant to order 2 Rules 6 of the High Court of the FCT CPR. 2018 Section 6(6) (b) of the constitution of the FRN 1999 as amended and section 1 of the CRA LFN and under the inherent powers of this court dated and filed the 27/11/20 wherein the applicants are seeking the following relief(s).

(1) A declaration that the welfare of IREMITIDE GIFT ADELAKUN born on the 7/7/20 is paramount to the determination of the custody of the child.

(2) A declaration that the welfare of IREMITIDE GIFT ADELAKUN would be secured or guaranteed if granted to

the applicants who are the material grandparents of the child.

(3) An Order of this court granting custody of IREMITIDE GIFT ADELAKUN to the applicants who are the material grandparents of IREMITIDE GIFT ADELAKUN till he is of age to determine for himself where he will live.

(4) An Order granting the Respondent unrestricted access to IREMITIDE GIFT ADELAKUN being his biological father.

(5) For such further Orders that this court may deem fit to make in the circumstance the grounds upon which this application was brought and the facts avered in the affidavit in support of this application deposed to by the 2nd applicant MARY ADIE CHIMONGES are as falls.

- *That the applicants who are Kenyans are the material grandparents of the baby IREMITIDE GIFT ADELAKUN born on the 7/7/20 to a now deceased JOY CHEMONGES and the Respondent, who allegedly contracted a marriage in Nigeria in March, 2019.*
- *That the said marriage was contracted without the consent and knowledge of the applicants and that the Respondent kept the applicants and their family in the dark about everything concerning the deceased.*
- *That sometimes in July, 2020 a friend of the deceased contacted the 1st Applicant Via Social media and Informed them that the*

deceased had put to bed and was in a critical condition at the Hospital

- *That 2nd Applicant spoke to the deceased who informed her that she had a GIFT (IREMITIDE GIFT ADELAKUN) for 2nd applicant family and would return to Kenya as soon as she becomes well.*
- *That a few days afterwards, 2nd applicant was informed by the 1st Baptist Methodist Church Garki Abuja that her daughter Joy had died.*
- *That prior to her demise the late Joy and the Respondent Instructed REV. MRS. THOMAS a member of 1st Baptist Church Gubile Street, Area 11 Abuja to hand over the child to the church because of their financial constraint.*
- *That the said Church agreed to take custody of the baby until the applicants come to Nigeria and take the baby to Kenya.*
- *That upon enquiry 2nd applicant was informed by the leadership of the 1st Baptist church Garki Abuja that the child had to be kept with same for the following reason.*

  That the Respondent and the deceased requested the Per Mrs. Thomas to take custody and care of the baby.

  The Respondent has no clear and identifiable means of livelihood as to enable him cater for the well being of the child.

  That since the birth of the child the named church has been responsible for his total wellbeing till date.

- *That the Respondent has not made any form of contribution towards the maintenance of the child since his birth.*
- *That the named church has made contribution to the sum of N1, 000,000.00 (One million) to the Respondent so as to support him in providing for the well being of the child but the respondent has squandered the money without providing for the child.*
- *That the Respondent has no known verifiable residence where he can accommodate the child.*
- *That while the deceased was in hospital the Respondent was unable to pay her medical bills until her demise.*
- *That the Respondent does not have the interest of the child and is in no position to care for and raise the child.*
- *That the applicants have the financial means to adequately provides for the child and raise him to be morally and socially responsible.*
- *That the applicant will provide the child with formal education up to the tertiary institution.*

In Applicants written address, applicants submits that in an application for the grant of custody of a child the fundamental factor, the court are enjoined to consider is the best interest of the child and no any other consideration applicant refered to section 1 of the CRA 2003 and submit, that the handover of the baby to Rev. Mrs. Thomas is evidence of the lack

of capacity by the Respondent. That the Respondent has not made any contribution for the upkeep of the child but has instead, Squandered the money given to him by the Baptist Church to assist with the maintenance of the child.

Applicants referred to **ALABI VS. ALABI (2007) 9 NWLR (PT 1039) PG 297 AT PG 347 348 PARAGRAPH D-A.** The Maternal grandmother of the child has a wealth of experience in raising Children she is in better position to be granted custody of the child as the court is enjoined to grant custody to a 3rd party where the biological parents are not in a better position to cater for the child the Maternal grandparents of the child are not total strangers to the child and that the child will be happy with his maternal grandparents who are willing to give the child the necessary love and care.

Applicants counsel referred the court to the case of **ODUSUJI VS. ODASUJI (2012) 5 NWLR (PART 1288) PAGE 478 @ 5084-505 PARAGRAPH H-A; See also OKOBI VS. OKOBI (2020) 1 NWLR (PART 1705) PAGE 301-341 PARAGRAPH F-G. IN ODUSOJI** (Supra) the court held:

> *Babies are presumed to be happier and more at piece with their mothers because of the closeness and intimacy which closeness beers.*
>
> *Though the mother of the baby is child, the 2nd applicant is in a better position to fill the gap in the Interest of the baby as*

mother have equal right to the fathers see ***NWOSU VS. N. (2012) 8 NWLR (PG 1-P23 PARAGRAPHS B-D.***

In opposition to the originating motion, Respondent filed a Counter Affidavit dated and filed. On the 23/2/21 attached to it are two exhibits and 54 paragraphs Counter Affidavit.

He avered the following facts that: he is a Nigerian and biological father of IREMITIDE GIFT ADELAKUN who is the subject of the applicant's application for custody.

2. *That Respondent married JOY CHOLENGET CHEMONGES (Now deceased) in Nigeria in accordance with the marriage Act after waiting for about 2years for the applicant's consent.*
3. *That the deceased was in communication with every member of her family regularly and that she (the deceased) Never made any promise to the applicant, or anyone to give them a gift of a child Respondent denied applicants paragraph 15 and put same to the strictest proof.*
4. *That when the deceased was referred to Wuse Hospital, MRS. TAKPATERE (a Nurse in Wuse General Hospital and a Church member) asked respondent if she could help them take care of the baby. In her house which was with the church premises and both parents of the child consented.*
5. *That after the death of the child mother Respondent denied that the baby be handed over to his elder brother and his wife who*

resides in Abuja and have Young Children of her own. Respondent denies having financial restraint and avered that he provided for the child's need while same was with Takpatores and with his elder brother and wife.

Respondent further avered that he never consented to the baby staying with the takpateres until applicants arrived from Kenya and that his elder brother was coerced by the church to handover the baby back to the church without Respondent's consent.

That at the time his wife died there were no passenger flight height in and out of Nigeria due to the corona virus out break and that the applicants consented to the burial of the deceased.

That the said Church has held on and was reluctant to handover the baby to the Respondent who avers not to have consented to the child being with the named church after being released to his brother and wife.

Respondent complained to the National Human Right Commission who in turn invited the 2nd applicant and takpateres.

That peace was brokered at the commission as form of settlement was drown up and that the baby was to be handed over to the Respondent.

That on the day fixed for the handing over of the baby to the respondent, the applicants informed the commission of the court order.

Respondent stated further that he has the means to care for his family as he has been providing for the baby's food, medication and every other need of the baby since its birth.

That the commission inspected his house and asked for his statement of account.

That he got nanny for the baby as proof that he could take care of his child.

That the one million was given to him as contribution by the Kenyan Community, some members of the church.

That the Respondent resides at his own house, a plot of land of about 648 Sq. In a gated private estate and built on it 5year ago.

That as the biological father of the baby he wants same to be raised in accordance with the Yoruba custom and tradition under the guardian of his parent who are the child paternal grandparent.

That the applicants are Kenyan who does not resides in Nigeria and Respondent wants the child to grow in an environment where he will have unrestricted access to him granting custody to the application will amount to taking away the child from him and also restricted his access to the child.

In Respondent written address he submits that under the Nigeria legal system it is the child right act 2015 that governs all matters of applicants relating to a child below the age of 18 as well as custody issues see section 69 CRA 2015.

It is trite law where the law has made express provision for the doing of an Act the duty of the court is to apply the law as it is and not to add or subtract see **EMESIM VS. NWACHUKWU & ORS LPELR 6573 CA** submitted that the CRA did not envisage a situation where the Maternal grandparent of child shall apply to a court to have custody of a child whose father is still alive. By this provision the application of the applicants is dead on arrival and incompetent. Respondent further submitted that applying the provision of part 1 of the CRA to the applicants case, it is the right and duty of the Respondent as it relates to custody of a child that should be considered in determining the applicants application above every other person herein.

Respondent states that, according to Nigeria law and constitution a person can determine who can keep his child and the Respondent has expressly and unequivocally stated that he does not want the takpatere and the CHEMONGES to be guidance of his son. See section 27 of the CRA 2003 and the case of **ANOLEFO VS. AN (2019) LPELA**. Respondent submit that the affidavit evidence of the applicants is full of here say and has not disclosed any substantial reason why they should be granted custody of the child.

The applicant filed a further affidavit to their originating motion and a reply on points of law dated 24/2/21 and denied paragraph 6, 7, 10 to 14 of respondent's Counter Affidavit. Applicants avers that the Respondent married their daughter without their consent and that the

Respondent Never visited the child ever since the demise of its mother that the Respondent violent behavior at his brothers house compel Respondent's brother to return the child to the church. An applicant avers that peace was not broked at the commission as they were not made part of the proceedings. That also the church was willing to handover the child back to the Respondent after ascertaining his residential address and place of work.

That the deceased was gainfully employed and was the one catering for the respondent.

That both of them, lived in an uncompleted building.

That the applicant have been the one spending time with the child and providing its need contrary to Respondents paragraph 39, 41, 51 of the Counter Affidavit.

That the applicants have the means to cater for the child till he comes of age applicant reply on point of law contended that paragraphs 9, 25, 28, 45 and 46 of the Respondent Counter Affidavit offends section 115 of the Evidence Act see **OGUN WALE VS. SYRIAN ARAB REPUTER (2002) NWLR (PT 771) PG 127 @ PG 153-154, PARAGRAPHS H-G** and urged the court to strikeout, paragraphs 9, 25, 26, 28, 45 & 46 of the Respondent's Counter Affidavit. Applicant contend that the case of **EMISIM VS. NWCHUKWU** Supra is not applicable in this case. Also section 27 of the Child Right Act cited by the respondent is misconceived

as the said section envisages the situation of kidnapping and abduction of children being taken out side Nigeria for illegitimate purpose also the case of **ANOLIEFO VS. ANOLIEFO** (supra) does not favour the case of the Respondent but same favour the Applicants case Respondent did not denied that he did not have a means of livelihood as nothing is before the court to that effect this is an admission which need no further proof. Applicant refers the court to section 123 Evidence Act and the case of **INAKOJU VS. ADELEKE (2007) 4 NWLR PART (1025) PG 423 AT 684 TO 685 PARAGRAPHS H-B.**

The 2nd applicant deposed to an affidavit of facts dated and filed the 5/3/21. Where she avered to bring to the notice of the court that after proceedings of 25/2/21. The Respondent through his solicitors wrote a letter dated 26/2/21 to the pastor in charge of 1st Baptist Church Garki Portharcourt Crescent Abuja demanding that the custody of the child be given to the Respondent within 48 hours see later dated 26/2/21 from FALANA & FALANA CHAMBERS to the pastor. Also in the case file is undated and unsigned term of settlement from the National Human Right Commission and a letter to the court with reference No: C/2020/VG/1965-1966/HG dated 24th February, 2021. Also in his reply on point of law filed on the 3/3/21and dated the 2nd/3/21 the applicant tried to distinguished same of the case cited by the respondent counsel of their inapplicability in this application. In consideration of the facts and circumstance and both the judicial authorities and case law cited by the two team gentlemen is to look at and consider the provision of

section 71 (1) of the Matrimonial Causes Act CAP M7 LFN 2004 is the cynosure of the present case which is whether the applicants who are grand parent of IREMITIDE GIFT ADELAKUN (an infant) are to have custody of the infant or whether custody should be granted to the respondent. Section 71(1) MCA state:

> *In proceedings with Respect to the custody, Guardianship welfare advancement or education of children of a marriage the court shall regard the interest of those children as the paramount consideration and subject thereto, the court may make such order in respect of those matters as it thinks proper. Equally section 69 (1) CA-CRA States 69 (1) the court may: (A) an application of the father or mother of child make such order as it may them fit with respect to the custody of the child and the right of access to the child of either parent, having regard to;*

(i) *The Welfare of the child and the conduct of the parent.*

(ii) *The wishes of the mother and father of the child.*

(B). after, vary or discharge an order made under paragraph (a) of this Sub-section on the application of the father or mother of the child.

(iii) *The guardian of the child after the death of the father or mother of the child.*

(C). in every case, make such order with respect to cost as it may think just. In the case of ***ALABI VS. ALABI (2007) LPELR 8203 CA*** *while the applicant relied on the lead*

Judge stated that in deciding what the welfare of a child is factors which have been considered relevant by the court include:

(i) The degree of familiarity of the child with each of the parents or parties.

(ii) The amount of affection by the child for each of the parents or vice versa.

(iii) The respective in came of the parties.

(v) The fact that one of the parties now live with a 3rd parties as either man or woman.

(vi) The fact that in the case of children of tender age's custody should normally be awarded to the mother unless other considerations make it undesirable etc.

It is not in doubt that the deceased was married to the respondent see paragraphs 5,6 & 7 of the applicants affidavit in support and paragraph 5 of the Respondent Counter Affidavit and Exhibit A1 and that the child Iremide Gift Adelakun is a product of the said Marriage. On the respondent contention that the applicants application for custody is incompetent because the provision of the Child Right Act has not envisaged a situation where the maternal grandparents of a child shall apply to a court for custody as in the present case Child Right Act section 68 states where the court makes a residence order in favour of a person who is not the parent or guardian of the child concerned, the person shall have parental responsibility for the child while the residence order

remain in force. It should be noted by the provision of section 71 MCA, 71 (3) MCA (3) the court may if it is satisfied that it is desirable to do so, make an order placing the children or such of then as it thinks fit in the custody of a person other than a party to the marriage. The applicants by their paragraph 24, 25 and 26 have avered that they have the financial means to adequately provide for the child, his formal education up till Tertiary institution. The reason for custody is to have the child in a place where he can be adequately cared for while the respondent in his paragraph 42,43& 44 of his Counter Affidavit states that he wants the child to be raised in accordance with the Yoruba Culture and tradition.

He also wants the child to be raised in accordance with his Christian faith and in an environment that he will not have unrestricted access to. The applicants by their Exhibit Chemenges 3 have attached a copy of the bank statement which was in Kenyan shillings. There is nothing before the court showing the exchange rate of the Kenyan shilling. To the Naira so as to enable the court have a clear understanding of how much the applicants are presenting before it. See **LUFTHANSA GERMAN AIRLINES VS. ODOFE** per **EKAREM JCA**. In exhibit Chemanges 4 that shares the tenants and rent paid on a certain property in Roli Estate, has no currency reflection. The respondent on the other hand by his paragraph 33, 34,35,36 & 38 of his Counter Affidavit has not put any document before the court to support his position in these paragraphs.

He has not denied either paragraph 18 (ii) of the applicants affidavit in support as regards his means of livelihood. On the issue of admissibility of documents argued by the respondent that the applicant computer general Exhibits Chemanges 2a, 2b, 2c, 2d, & 2e are in admissible Electronic evidence are **Sui Generis** non-compliance with provision of section 84 & 84 (4) Evidence Act made same in-admissible. In **OMISIRE VS. AREGBESOLA (2015) LPELR 25820 (CA)** held any piece of electronic evidence that does not comply with this legal requirement is not admissible in evidence.

On respondent argument that applicant document attached to this originating motion are not admissible having failed to comply with the procedure of the Evidence Act. The case of **JUKOLE INTL LTD VS. DIAMON BANK PLC (2006) 6 NWLR PT (1507) 55** and **ALABAM VS. C.O.P BENUE STATE 2019) LPELR-47283 CA** made same admissible in Evidence Act. On the involvement of the National Human Right Commission the issue is quite different with case at hand see paragraph 17 of the applicant's further and Better affidavit. On the issue of unsigned document see **HARUNA VS. UNI AGRIC MAKURDI & ANOR (2004) LPELR 5899PER NZEALOR JCA PP 54 -56 PARAGRAPH D-B.**

Not every unsigned document is void the authorities relied on by the applicant counsel seem to apply to specific types of document and would not apply to an address which the rules of High court or the law does not

specifically require to be in writing and signed. See 27" CRA relied on by the Respondent's counsel does not in all intent and purposes Applied.

Respondent paragraph 9,25,26,28,45 & 46 of Counter Affidavit offend section 115(2) Evidence Act while paragraph 15&19 of the affidavit in support of originating motion offend also section 115 (2) of the Evidence Act contrary to paragraph 11 of the applicant affidavit Exhibit 2,2a,2b, 2c, 2d & 2e attached to the applicants further affidavit show that the applicants were in touched with their now deceased daughter as they are in possession of a copy of her employment letter and pictures. On Respondent contention that the Nationality of the applicants is unknown because this application before the court is attached copies of their intending passport. In paragraphs 6&7 of the Applicants further and better affidavit show that the respondent visited the applicants in their home at Kenya, Respondents by his paragraph 6 of the Counter Affidavit confirmed that section 111(1) Evidence Act made it mandating for all public documents to be certified before they are admissible in proceedings see **OBEYA VS. FBN PLC (2010) LPELR 4666 CA**. the document attached to the affidavit of fact, a copy of originating motion and a copy of affidavit in support by the applicants ought to have been certified by the producers of the said document but they are not see Ono **BCRUCHERE VS. ESEGIN & ANOR (1986) INSCC VOL. 17 PG 357.**

I have substantially dealt with the entire application in this Judgment. I am of the view that both parties in this case here have not provided the

court with the substantial material facts that would move the court in granting the application. However, in the circumstances the position of the Respondent is quite been taking into consideration the interest of the child which is of outmost importance. Going by the authorities generally cited in this Judgment and with the help of the authorities cited by the two learned counsel for and against. I deem it just to grant custody to the Respondent principally under strict compliance with the following conclusion:

1. *The Respondent shall provide the court with the details of his monthly weekly earnings this is to show a proper custody of the child.*
2. *The principal officer of a social officer where the Respondent resides must on quarterly basis inspect and supervise the general well being of the child.*
3. *The Respondent shall produce his parents who would now look after the child to the social officer (director) where the Respondent resides so as to ensure their capability and concern toward the upkeep of the child.*
4. *Any directive the social officer of the area where the Respondent resides deem necessary to imply on the Respondent for the betterment and general well being of the child*.

This Judgment is in line with section 71 (1) Matrimonial Cause Act. Section 68 (6) of the Child Right Act and other relevant and judicial authorities in cooperated in this Judgment as part of this judgment the

applicant must be given unhindered/unrestricted access whenever they want to make a visit in order to see the child.

Signed
Hon. Judge
31/3/21

Appearance:
Ifeanyi A Azuamah & Ezekiel Ameh for the Respondent.