

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT NYANYA- ABUJA

THIS TUESDAY THE 24TH DAY OF OCTOBER, 2024

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/CV/910/24

BETWEEN:

YUNUSA LAWAL GWAMNA.....CLAIMANT
AND

RADIYA ILIYASU MUSTAPHA..... DEFENDANT

JUDGEMENT

The Claimant/Appellant by an originating motion pursuant to section 69 of the child's rights act 2003 with suit no FCT/HC/01/910/2024 dated 15th January, 2024 prays this Honourable court for the following reliefs:

- 1. An order of this Honourable court granting the Appellant sole custody of Miss Gwamna Rachael Yunusa (the child) who is a minor and offspring of the Appellant.**
- 2. An order of this Honourable court granting the Defendants/Respondent supervised visiting access to Miss Gwamna Rachael Yunusa (the child) in a manner inform as this Honourable court may deem just and appropriate.**
- 3. An order of perpetual injunction restraining the Respondent from harassing or further harassing, threatening and further threatening and using derogatory word, against the appellant by the child and the general public.**
- 4. AND FOR such order or further order(s) as this Honourable court may deem fit to make in the circumstances of this case.**

The grounds upon which the Application is brought are as follows:

I-xvi

- i. The Applicant is the biological father of Miss Gwamna Rabia'at Yunusa (The Child).**

- ii. The Applicant lawfully married Late Mrs Mustapha HajaratuIliyasu ("The Deceased") who was the biological mother of the child being the subject matter of this suit.**
- iii. The marriage of the Applicant to the deceased was consummated and registered at the Ministry of the Federal Capital Territory, Abuja Municipal Area Council on the 16th day of March, 2019.**
- iv. The child was born at Deda Hospital on the 10th day of January, 2020, located within Jabi District and also within the jurisdiction of this Honourable Court.**
- v. The Applicant and the deceased upon the birth of the child have custody and proper parental care of the child.**
- vi. The deceased painfully and barely a month after the birth of the child died on the 27th day of January, 2020.**
- vii. Upon her death, the Applicant, his extended family and Respondent had a meeting where the Respondent pleaded to take possession of the child during the Applicant's period of mourning of the deceased.**
- viii. The Applicant between the period of the burial and after the rites in surplus supplied all request for the upkeep and food supply of the child to the Respondent.**
- ix. To the dismay of the Applicant, the Respondent in company of her children from Kaduna State, namely; HabibIliyasu Mustapha, AminaIliyasu Mustapha, ZainabIliyasu Mustapha, AbdulkadirIliyasu Mustapha, MaryhamIliyasu Mustapha stormed the house of the Applicant at FQB13, Lakeview Homes, KadoDistrict, Abuja- FCT on the 16th day of February, 2020.**
- x. To avoid the breakdown of law and order, the Applicant watched as the Respondent and her children forcefully broke his entire doors, ransacked and took away all valuable items in the apartment.**
- xi. The Applicant since then had been denied access and custody of the child despite several interventions and plea from families and religious leaders.**
- xii. The Applicant upon the deliberate failure of the Respondent to hearken and yield to the intervention of his families and religious leaders cannot watch his biological daughter nurture in such a toxic environment.**

- xiii. The Applicant is financially, morally and mentally sound to take full responsibility, custody and care of the child so as to attain her full potentials in life.**
- xiv. Till date, the Applicant has been unjustly and deliberately denied access to his biological child despite several attempts and mediation which necessitated this action.**
- xv. The Respondent by her persistent conducts lacks the capacity to have full custody of the child as the overall interest, education and welfare of the child is a primary consideration for the Applicant to be granted sole custody.**
- xvi. The child deserves proper parental and indeed paternal care in a healthy, stable, safe, secure, peaceful and loving environment.**

In support of the originating motion, is an affidavit in support of 37 paragraph deposed to by Yunusa LawalGwamna of no. 9 Nnewi Street Area 2 Garki Abuja FCT dated 16th January, 2024. Attached to the affidavit in support are exhibits marked exhibits 1, and certificate, ex. 2, Exh3, Exh4, Exh5, Exh6,7,8,9,10,11,12,13 and written address in support of originating motion of 5 pages, attached to it is a pre-action counseling certificate.

On receipt of the originating motion, the Defendant filed Defendant's memorandum of appearance dated the 9th day of May, 2024. Attached to the memo are the Defendant's counter affidavit, in opposition to the plaintiff's application by AbdulkadirIhpaso Mustapha of no. F12, ALbarkawa road, SabonGari Kaduna, Kaduna state, attached to the affidavit are exhibits marked as

- 1. Exh. A, application for issuance and summary from the UAC Mpape, FCT Abuja**
- 2. Exh 3. Civil summons**
- 3. ExhC. letter from Spectrom legal services addressed to facility manager, Lakeview Home, Ltd, request for report on activities of 16th February 2020 in flat FQB13 phase 1 Lakeview Home Kado, FCT Abuja, dated 13th February, 2023**
- 4. Exh D same as exh C.**
- 5. Exh E terms of settlement dated 02 Oct. 2023 between Waley of Late Hajarawakeel by Yunusa LawalGwamna**

And a written address in support of counter affidavit of 14 pages wherein the written address counsel to the defendant formulated her issues distilled for determination towit

- 1. Whether the Honourable court has the jurisdiction to entertain issue**
- 2 custody of a MUSLIM child and whether this case as presently constituted is not an abuse of court process.**

2. Whether the plaintiff has made out a case for the grant of this application

The plaintiff/appellant in request of the Defendant/Respondent's counter affidavit, filed a further affidavit in opposition to the counter affidavit dated the 21st day of May 2024 same deposed to by Yunusa LawalGwamna of 35 paragraphs, attached to the further affidavit are the following exhibits

1. Exh 14 proposed term of settlement in suit no C4/44/2022 between Yunusa LawalGwamnavsRadiyaIliyasu Mustapha

And reply on points of law of 4 pages whose sole issue was distilled for determination to wit

“Whether the child right's Act, 2003 clothes this Hon court with the jurisdiction to determine the reliefs sought by the plaintiff/Applicant putting into consideration the facts of this case.

This matter was mentioned dated 11th June, 2024 wherein motion were taken as parties adopted their written addresses the same day;

Now to the first issue as to whether this Honourable court has the jurisdiction to entertain the issue of custody of a Muslim child and whether this case as presently constituted is not an abuse of court process.

On this it is the argument of the learned counsel to the Defendant that courts are created by law and it is the law that clothes them with the power and jurisdiction for adjudication. If a law does not confer jurisdiction on a court or tribunal, the court and parties cannot even by agreement endow it with jurisdiction and whatever decision reached by such courts is a nullity.

Furthermore submitted that for a court to have jurisdiction to entertain a matter the subject matter must be within it's jurisdiction and there no feature in the case which robs the court of the jurisdiction to entertain same. See Bairaniapp, in the celebrated case of Madukolu & ors vs Nkelidum (1962) PHCR, 24023 (SC). From the above submitted that this Honourable court lacks the jurisdiction to entertain the instant case as the subject matter is governed by Islamic law.

Further submitted that, at the time of their marriage the plaintiff and late Hajara were both Muslims, they consummated their marriage as Muslims, their daughter Rabiya was born and named as Muslim and after the death of Hajara her estate was distributed to her heirs in accordance with Islamic law of inheritance and therefore custody of Rabiya is therefore automatically governed by Islamic law of Hadane (custody).

The Defendant counsel further submitted that, the personal law of every Muslim is Islamic law, and what constitutes Islamic personal law has been summarized by the court of Appeal in the case of LafiyavsShuwak (2022)

As to which amounts to Islamic personal law, the constitution of paragraph (A) – (E) of section 277 (2) has itemized those subjects, areas or matters over which the Sharia court of Appeal of a state can exercise. Appellate and supervising jurisdiction in relation to marriage, the dissolution of marriage, family relationship guardianship of an infant, Wakf, government will or succession where the endower, donor, testifier or deceased person is a Muslim.

On this, referred the court to section 262(2) of the 1999 constitution (as amended) which provides that

“(2) For the purpose of subsection (2) f this section, the sharia court of appeal shall be competent to decide

(a) Any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such marriage or a question that depends on such a marriage and relating to family relationship in the guardianship of an infant.

(b) Where all parties to the proceedings are Muslims, any questions of Islamic personal law regarding a marriage, relationship the validity or dissolution of the marriage, or regarding family relationship, a fronting or the governorship of an infant.

Based on the provision of section 262(a) (c) (b) above subject that, it is clear and unambiguous to the effect that custody and guardianship of an infant where all the parties are Muslim is a question of Islamic personal law to be determined based on principles of Islamic law. My lord Mohammad Baba Idris JCA as he then was in the case of Umaru v Yaya (2021) LPELR – 55008(CA) held thus:

“The jurisdiction of the Sharia court of appeal is thus invited to issues relating to Islamic personal law namely, marriage, divorce, inheritance, including matters concerning waqf, gift or successions custody and governorship of children.

Following from the foregoing submitted that, it is clear that custody of a Muslim child forms part of Islamic personal law, and that the question of Islamic personal law, falls under the jurisdiction of the sharia court or any other court that is subject to supervision of the sharia court of appeal so that in the event any parties become aggrieved his appeal shall then be to the Sharia court of Appeal.

The Defendant further posed a question thus:

“That does this court share that jurisdiction with the Sharia court of appeal? In case this court entertains the issue of custody of a Muslim child of Muslim parents? In this referred the court to the case of Mandara v Amin and ors (2004) LPELR 57793 (CA) and acted in the judgment, the case of Jiddeum V. Abuna (2000) FWLR (BL 24) 1405, (2001) the NWLR (pt. 686) 209/217 paragraph G-H by WARRI JSC. Also in that case Achika JSC of blessed memory has this to say in page 24 para B-D

“Although on record, the respondent sued the plaintiff and the appellant was the Defendant, nevertheless having regards to the main complaint, before the trial court, under sharia providing law, it is the nature of the complaint before the court and not necessarily the party who initiates the action that may be responding.

“Plaintiff by the court”

Where there is seemingly conflicting between what law shall apply, and therefore which court shall have jurisdiction to try the matter, one must consider the dominate feature in the matter and determine which of the courts have jurisdiction...”

On the above decision of the court submitted that custody and guardianship of an infant, are some of the components of Islamic personal law in the same manner as inheritance and gift. That the law is settled that once the subject matter of dispute falls under Islamic personal law, only the sharia court or an Area court founded in Islamic law that can validly entertain and determine the disputes.

Furthermore, submitted that the plaintiff in this case is visibly aware that their affairs were governed by the principles of Islamic law when he filed an action at the upper Area court Mpapeseeking for the distribution of the estate of the late Hajara under the principles of Islamic law exhibits A-B.

The learned counsel to the Defendant further stated that the plaintiff inherited part of the estate of the late Hajara, in accordance with the principle of Islamic law having been inherited from the deceased under Islamic law, can he now turn around and seek for custody under the child right’s act? That the law is settled that once a party has benefitted from something, he cannot turn around and challenge it.

See. Mocoh SA &Anor v Shield Energy Ltd &Ano (2021) LPELR – 54559 (CA).

The Defendant learned counsel went further teaching on the child's right act law, which is applicable to the instant case, on this it is the submission of the learned Defence wherein that Islamic legal system is a complete legal system which leaves no room for the modern legislature and the exception are tools of Jihad such as Ijama, Quyas.

Furthermore, that the Islamic law being a complete law that does not need to be supplanted by the legislature, reference to item 61 of the and schedule, part of the 1999 CFRN (Exclusive legislature estate which prohibits the National assembly from enacting laws that would govern marriages under Islamic law and customary marriage, it provides thus:

The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto.

In view of the above provisions submits that, it is therefore clean, to effect that the national assembly have no powers to legislate on marriage under Islamic law and matrimonial causes relating thereto.

That a cursory look at paragraph 2,3,4 and 6 of the preamble to the affidavit in support of the plaintiff's originating motion, clearly shows that that plaintiff is a Muslim and the foundation of his claims before the court rest on his marriage to the late Hajara, the mother of Rabiata Yunusa Gwamna. Therefore submits that the issue of custody is another relating to the marriage of the plaintiff and the deceased and their status as Muslims therefore holds that, the provisions of the child right's act, have no place in the determination of custody of Rabiata.

The learned defence counsel further submitted that, the provisions of Islamic law and it's applicability on Muslims is by it's very nature very special and specific, while the provisions of the child right act is general in nature. The law is settled on wherethere is conflict as to which should apply between a general and specific provisions/legislation, the specific provision shall apply. See Udensi O. Okorie (2017) LPELR 42640 (CA).

“The law is settled that where a specific statutory provision as in the instant case is made for the filing or originating a claim by a court, the procedure so laid down ought to be followed in the presentation of the action and not the general procedure. The maxim is a generalia specialibus non-deregunt. See City Eng (nig) old vs Nig. Airports Authority (1999) II NWLR pt 625) 76.

In view of the foregoing submit that, the provision of the child's right act cannot apply to the facts of this case nor can it be even looked at in this case under the guise of specific or general on the face of express provisions of item 61 of the

2nd schedule part 2 of the 1999 (CFRN) are the case of FRN V Osahon & ors (2006) LPELR-3174 (SC)

The learned Defence counsel went further to submit that in attempt to divert the attention of the court, the respondent in paragraph 4 of the affidavit in support of the originating motion states that his marriage to the deceased was consummated and registered at the ministry of the FCT AMAC on the 16th day of March 2023. That by the content of the Respondent's deposition it was a marriage already celebrated that was registered. On this submitted that, those averments cannot by any stretch of imagination be interpreted to mean that the marriage was celebrated under the marriage act when the respondent did not deny that the marriage was celebrated under Islamic law on the fact that they are all Muslims guided by the principle of Islamic law.

The learned Defence counsel went further and submitted that, if the respondent wants to prove that his marriage to the deceased was under the act, he must in accordance with sections 7 to 10 of the marriage act provide the following

- i. That the marriage notice was given to the registrar of marriage of marriage acting or the Abuja married.**
- ii. The said notice was in form a signed by him or the deceased upon payment of prescribed fees.**
- iii. The registrar has entered the notice in a book called marriage notice register**
- iv. The notice was published by the Registrar**
- v. After 21 days from the act of publication of the notice, there was no objection to the marriage, consequence upon which the registrar issued them with a certificate of marriage and**
- vi. That the marriage was celebrated within three months from the date of notice.**

That on this none of the conditions from i-vi listed above was even faintly established by the respondent.

That exhibit I, the purported marriage certificate clearly stated that the marriage was under native law and custom. He posed this question" which native law? which custom? that is Islamic law. That why the plaintiff is not seeking for custody according to the native law and custom. That by the provisions of item 61 of the 2nd schedule, part I of the CFRN, 1999 marriage under native law and custom can only be regulated by the said natural law and custom.

The Defence counsel in furtherance to this submission referred this court to section 27 of the LG. (Basic constituted and transitional provision) act which provides this:

The main functions of a local government shall be as follows:

(a).....

(i) **Registration of all births, death and marriage.**

Section 30 & 33 of the birth, death e.t.c (compulsory registration) Act, 1992 respectively provide as follows:

30(i) Notwithstanding anything contained in any enactment, every customary marriage, contracted in or dissolved in Nigeria, shall immediately after the commencement of this act, be registered within sixty days in the area court or customary court where the marriage was contracted or dissolved.

33. **All registers, decrees, indexed and other documents relating to the registration of customary marriage and divorce, which are at the commencement of this act, deposited and elsewhere, and all registers and records in the custody and control of registrars which now are, or hereafter shall be, disused or filled shall be deposited, in the custody of the registrar general or in place as he may direct.**

That in line with the above submits that registration of marriage is done in accordance with the provisions of the laws listed above for record purposes and so. It does not change the mode of celebration of marriage and or the law governing marriage and other related issues.

Finally submits that the plaintiff first went to Upper Area Court 4 (four) years ago seeking for the distribution of the estate of late Hajara under Islamic law. This clearly shows that the plaintiff knew that their relationship as Muslims, was regulated by the principles of Islamic law. The plaintiff indeed inherited part of the estate of late Hajara based on the ratio of a husband, as contained on Quran chapter 4 verse 12, which provides this:

“And for yours is half for what your wives leave if they have no child but if they have a child for you is one fourth, of what they leave, after any bequest they (may have) made or debt.....”

On this submits that the plaintiff brought this case with the sole aim of annoying, intimidating and harassing the Defendant. It is therefore an abuse of court process of the highest order and urged the court to dismiss same in line with the decision of the supreme court in the case of Nwosu V PDP ors (2018) LPELR 44386(SC)

The plaintiff/Appellant in its further affidavit in opposition to the counter affidavit dated 21st day of May, 2024 and reply on points of law, making an issue for determination on whether the child rights act 2003 clothed the honourable court with the jurisdiction to determine the reliefs sought by the plaintiff /appellant putting into consideration the facts of this case

On this it is the argument of the learned counsel to the plaintiff/Appellant that the originating motion dated the 16th day of February, 2024 brought pursuant to section 69 of the child right act 2023 being an act of the national assembly

and the principal legislation targeted at the ultimate protection of the right of every child in Nigeria.

On this submits the section 1 & 2 of the Act, are specific on the best interest protection and care necessary for the well being of every child and as a paramount and ultimate consideration without any form of discrimination based on gender, custom and religion.

Furthermore, the plaintiff counsel submitted that, the defendant's erroneous and misleading the court that the subject matter before the court is covered by Islamic personal law for which the Islamic Court has exclusive jurisdiction is misconceived in law. On this he stated that the matter instituted at the upper area court by the plaintiff does not include custody of the child being the subject matter of this suit, hence does not amount to abuse of court process. That the crux of the plaintiff's action is for custody of his biological child which is guaranteed, protected, provided and enforceable under the child right's act 2003 and applicable in the FCT. On this submitted that exhibit A attached to the counter affidavit which is an application for the issuance of civil summons in the suit initiated by the plaintiff at the upper area court Abuja was Solely for assets distribution and cannot take the place of the marriage certificate or evidence that the marriage between the plaintiff and the late wife was celebrated and conducted in accordance with Islamic principles.

Furthermore that exhibit 5 attached to the originating motion that the marriage between the plaintiff and his wife who is now deceased was consummated and then registered at the FCT Abuja municipal area council and that matters brought under the child rights act 2003 are sui generis

On this he referred the court to section 149 of the act which provides thus:

“There shall be established for each of the federation and the FCT, Abuja, a court to be known as family court (in this Act) for the purpose of hearing and determining matters relating to children”.

Equally section 151 (1) (a) provides thus:

Subject to the provisions of this act and in addition to other jurisdictions as may be conferred on it by any other law, the court SHALL have unlimited jurisdiction to determine

(a) Any civil proceedings in which the existence or extent of a legal right, power, only, liability, privilege, interest, obligations or claim in respect of a child is in issue.

s. 162 of the same act provides thus

“No other court except the family court shall exercise jurisdiction in any matter relating to children as specified in this act.

Furthermore submitted that, there is no doubt, and it is a settled position of the law that the child’s right act is the supreme law with respect to the rights of every child in Nigeria. Reference to section 274 of the act which provides thus:

- 1. The provisions of this act supersedes the provision of all enactments relating to**
 - A. Children**
 - B. Adoption, fostering, guardianship, and wardship**
 - C. Approved institutions remand centers, and borstal institution and**
 - D. Any other matters pertaining to children already provided for in this act.**
- 2. Accordingly where any provision of this act is inconsistent with any of the enactment specified in subsection 1 of this section the provision of this act shall prevail and that other provision shall to the extent of the inconsistency be void.**

In all this urged that this court has the jurisdiction to hear and determine this matter on merit.

I have carefully gone through the submissions of both the plaintiff and the defendant counsel the argument canvassed therein there is no strength of imagination so to say that issue in contention in this suit is whether on the custody of the child and whether this court is clothed with the jurisdiction to entertain this suit on the basis of exhibit 1, being the marriage certificate between late Hajaralliyasu Mustapha and Yunusa L.Gwamnada dated 16th March, 2019. At AMAC Marriage Registry, FCT, Abuja.

There is no doubt that custody of children are all governed by both the child's right Act, and the Islamic law.

It is to be noted that both the plaintiff and the defendant are all Muslims and being Muslim suffice that their marriage will be governed by Islamic law. Simplicita, so to say.

The submission of the learned plaintiff counsel is to the effect that the marriage conducted & consummated and by the issuance of the marriage certificate at AMAC marriage registrar cannot be the true reflection as the parties are Muslims, both parents are Muslim and that what governs the plaintiff and the defendant is The principles of Islamic law this is to the extent that the plaintiff have on the 7th day of July, 2020 after Hajara’s death filed an action at the Upper Area Court seeking for the distribution of the estate of late Hajara in accordance

with the principles of Islamic law. Exhibit A&B speaks volumes on that. The said Upper Area Court Mpape distributed late Hajara's estate to her heirs in line with Islamic principles of inheritance & the plaintiff as her husband was given his share of the inheritance as prescribed in the Holy Quran, I hold therefore that the parties have agreed and filed this suit at the Upper Area Court Mpape for the distribution of the Estate in accordance with Islamic principle Suffice that Islamic laws governs both parties.

It is also on record that after the death of the Hajara, parties mutually agreed in line with the Islamic principles that the custody of Rabiya rests on the defendant and it was on that basis that the defendant took custody of Rabiya.

The defendant to further strengthen its case, responded to paragraph 26 of the plaintiff's affidavit thus: our mother (the defendant) had 11 children and all of us have been thoroughly educated both in Islamic and western education. All of us have degrees and most of us have memorized the holy Quran and several books of sign. By this can the plaintiff still deny that the marriage between them was governed by the matrimonial causes act on this I say no as the submission of the Plaintiff is just paperwork and does not tally with the reality on the ground.

My reasons are as follows

- 1. That the marriage between the plaintiff and late Hajara was contracted in accordance with the principles of Islamic law sometimes in March 2019, the marriage celebration was anchored by the chief Imam of the Danfodio Jumat's Musjid. Anguwan Sanisu, Kaduna state. By The very nature that the marriage was contracted in accordance with the principles of Islamic law, it suffices that the matrimonial and other related affairs of the plaintiff and late Hajara was governed by the principles of Islamic law as their personal law.**
- 2. The plaintiff on the 7th day of July 2020 after Hajara's death filed an action at the upper area court Mpape FCT Abuja seeking for the distribution of the estate of late Hajara in accordance with the principles of Islamic, see exhibits A & B respectively.**
- 3. Upon the filing of the action in Upper Area Court, Mpape FCT Abuja for the distribution of the Estate of the late Hajara, the upper area court Mpape FCT Abuja distributed late Hajara's estate to her heirs in line with Islamic principles of inheritance and the plaintiff as her husband was given his share of the inheritance as prescribed in the holy Quran.**

This reason as stated above I am convinced that both the plaintiff and the late Hajara are Muslims and do not intend that their marriage be governed by any other law.

In view of the foregoing, I hold that this suit is proper to be adjudicated & is guided by the principles of Islamic law hence advise parties to seek for the custody of the child by the same principles of Islamic injunction, I so hold.

Hence I shall decline jurisdiction to entertain the issue of custody of the only child, and ask parties to approach the appropriate Court.

Hence this suit is hereby dismissed.

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Hon. Justice A. Y. Shafa

Appearance:

1. ChukwukaObike holding the brief of BodundeOpeyemi Mathew, Esq, for the Claimant.
2. Aisha JibrinHolding the Brief of Y. H. Limanfor the Respondent.