

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

DATED THIS MONDAY 19TH FEBRUARY, 2024

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/CV/662/2022

BETWEEN:

DAVID OMONIJE.....CLAIMANT

AND

1. HON. M. A. WAKILI

(AREA COURT JUDGE (AREA COURT GRADE 1 KUBWA))

2. COMMISSIONER OF POLICE FCT

3. ARCH ADEBAYO OJISUA.....DEFENDANTS

RULING

This ruling is on a motion on notice dated the 16-10-2023, filed on the 24/10/2023 with motion number m/527/2023. The motion is brought pursuant to order 43 rule 1 and order 49 of the rules of the High court of the FCT civil procedure rules 2018 and under the inherent jurisdiction of this court praying this Honorable Court for the following orders:

1. An order extending time within which the 1st Rep/Applicant may file and serve his memorandum of Appearance/Notice of preliminary objection and other ancillary processes out of time.

2. An order deeming the memorandum of Appearance, Notice of preliminary objection and other processes already filed, served as properly filed, appropriate fees paid.
3. Any such further motion orders as this Honorable court may deem fit to make in the circumstances.

Accompanying the motion is an affidavit of 5 paragraphs deposed to by Ibrahim Ibrahim Ize Jariyat of I.G Haruna&co No 3 32, Hon Friday Ihulah Road phase 3, Gwagwalada and a written address in support of the motion on notice of 2 pages dated the 16-10-2023. Where in the written address, they formulated alone issue for the court's determination to wit.

Whether the applicant is entitled to the reliefs sought.

This motion which the Applicant/ Respondent counsel did not file any counter to but chose to reply on points of law. On this he referred this court to the case of

(1) News watch Communication LTD v Attah (2006) (2) Nwachukwu V Ibeto(2011) Pt 1231 p.230. in view of the above two cases we urge this court to dismiss the motion, as the motion is brought in order to irritate and frustrate the court to stop delivery of its judgment.

I have carefully gone through the motion papers, the affidavit in support, cases cited and the response by the respondent/applicant counsel's cases cited where the two cases both boils down on the issue of arrest of judgment yet to be delivered.

It is trite law that the duty of a judge in the adjudication of cases is to do justice to the parties without fear or favor. See Sha (Jnr) v Kwan (2000) NWCR (PT670) 685. He or she should not be carried away by sentiments and ensure adherence to legal technicality. He or she must be Impartial, Fair and just to both parties and because of the double sided nature of justice and fairness, the judge must be even handed. In our adversary system, it is incumbent upon the parties in a case to put their respective cases across the table before the judge, who as an impartial arbiter and umpire, will adjudicate on the issues in the controversy. That is the epitome of fair trait.

I said this based on the fact that the applicant/respondent did not file its counter response to the motion filed by the respondent/applicant. It is trite law that a party or counsel who fails to file a counter or reply affidavit is bound by the state of facts as related in the affidavit. Counsel cannot seek to push an alternative status of facts as contained in the affidavit because those facts are already deemed asevidence. In *Chairman EFCC V Littlechild* (2016) 3 NWLR (PT.1498)72, the court of Appeal per Osej: JCA, reiterated the well-known position that:

“it is also the fact that facts contained in an affidavit form part of documentary evidence before the court. Thus where an affidavit is filed deposing to certain facts and the other party does not file a counter or reply affidavit, the fact deposed to in the affidavit would be deemed unchallenged and undisputed. Simply put paragraph of affidavit not denied or controverted are deemed admitted.”

In *Ndabaniji V Otto* (2016) 13 NWCR (PT1529)171 of 192 paragraph G-H the Supreme Court of Nigeria speaking through Rhodes VivourJSC Obgeru

“No counter affidavit was filed by the applicant. Where facts deposed to in an affidavit have not been controverted such facts must be taken as true”

It is also the position of the law that failure or refusal to file a counter affidavit will not automatically make averments in the main affidavit the truth. Where only the applicant files an affidavit in a motion on notice such affidavit, notwithstanding that it is evidence, must be cogent and compelling and provide unshakable factual support for his application in order to attract any available ruling.

From the forgoing had that this court will lay on the side of justice, hence I shall grant the relief sought. The two reliefs sought therein is hereby granted as prayed. This is my ruling.

On the second motion no M/432/2023 dated the 18th September, 2023 filed on the same date, the notice of preliminary objection where the respondent/Applicant lays before the court two grounds of his objection

1. The action was commenced without the requisite leave of the court
2. The action is incompetent and the reliefs sought are for an order of the court striking out the suit for lack of jurisdiction.

Accompanying the Notice of preliminary objection is a written address in support of the 1st respondent/applicant notice of preliminary objection of 3 pages where in the written address he formulated a sole or lone issue for the Court's determination to wit

Whether the Applicant/Respondent's action is competent?

In response the Applicant/Respondent counsel filed a reply to the respondent's address in Support of a preliminary objection of 4 pages and in response, the 1st respondent/applicant counsel filed the 1st respondents' reply on point of law to the applicant's written address to the 1st respondent's Notice of preliminary objection of 5 pages.

The learned counsel to the 1st respondent/applicant in moving the motion adopted his written address as his oral argument in this application in arguing the court to strike out this suit for lack of jurisdiction.

In response the Applicant counsel submitted that the said reply of the applicant dated the 31/10/2023 is incompetent. That by the rules of this court order 43 rule 1(3) the applicant has 7 days to respond to their application that it is on the record that notice of preliminary objection was served on the applicant on the 12/10/23 and his reply was refiled on the 2-11-2023. An interval which is more than seven days on this ground, urged the court to dismiss the said reply to be incompetent.

The respondent/applicant in reacting to the reply on point of law of the applicant/respondent submits that in the interest of justice urge, we the court to extend the time for the reply as this is the issue of fundamental rights and the rules provides that the court should not be technical.

Furthermore that they filed a reply to the respondent's preliminary objection dated 3-10-2023 and filed the same date and adopted the argument in appropriation to the preliminary objection and that they were served with a reply on points of law, on this he submits that the reply on points of law is incompetent to the extent that he used the reply to submit and make a fresh application that was not on their notice

of preliminary objection and that even new facts in the affidavit were introduced in at the reply on point of law. On this he referred the court to the case of *Omuoguwachi v Ndo* (2000) 11 NWCR(PT590) 2004.

On this he submits that the reply should be on points he raised and not to raise new facts hence the court to discountenance the reply of the 1st respondent.

Finally, in the event the court does not agree with him, he referred the court to the preamble of law hearing and submit that the fair hearing is the main issue before the court on this referred the court to section 36 of the CFN 1999 as amended. That once a court is not competent to hearing the matter there is no fair hearing. That fair hearing is the substantive issue in this case. On this he referred the court to the following cases.

1. *Garba v Unimaid* (1980) 1NWCR (PT18)552
2. *Daguci V FRN*(2018) 10 NWCR (PT.1627)330.

Finally, that if the court is to allow the facts deposed by the points of law, we urge the court to call oral evidence in calling the bailiff of the court.

Now to the issues formulated by the 1st respondent/applicant counsel that is "Whether the applicant/respondent's action is competent"

On this the learned counsel referred the court to order 44 rule 3(1) of the FCT High court civil Procedure Rule 2018 the order provides thus:

"44(3(1))- No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule."

On this he submits that where leave is required either by the constitution or in the rules of court before filing a motion, and leave is not sought and granted, the court has no jurisdiction to grant the motion as it is incompetent. On this he referred the court to the case of *Nabore properties LTD V Peace cover (Nig) LTD* (2019) 2 NWLR (PT1444)440 at ratio 5 Arising from the above submit that obtaining leave of court to commence action for judicial review is a condition precedent which the applicant must satisfy for his/her application to be competent and for the court to have jurisdiction to entertain same. Furthermore, submits that the law requires that the rules of procedure governing judicial review must be strictly obeyed and

adhered to otherwise an application for judicial review will be incompetent as a motion see *Ohakim v Agbaso* (2010) 19 NWCR (PT 1226) 172 SC at ratio 19.

In view of the above we submit that the failure of the applicant to comply with the condition precedent reformed by the rules of the court before the commencement of this suit makes it incompetent and robs the court of its jurisdiction to entertain the suit. That the proper order the court should make where it leaves jurisdiction is an order striking out the matter. Referred the court to the case of *B-L-L-S Co LTD V M.V Western star* (2019) 9NWCR (PT.1678) 489 SC CT ratio 14.

In response by the learned counsel to the applicant/respondent who submits that the process before the court is an enforcement of fundamental rights, the originating motion under which the action was commenced clearly shows that it was brought under fundamental rights enforcement rules order 4 specifically therefore reference to the High court civil procedure rule is of no moment and extremely irrelevant to this case.

Before proceeding to resolve the issues as canvassed by the respective counsel I will first of all refer to the originating motion filed before the court. It is correct from the proceeding that the matter is brought under section 34(1) of the CFN 1999 as amended and order 4 of the fundamental rights enforcement procedure rule 2009 article 7 of the Africa Charter on Humans and people rights on ratified by the ratification and enforcement act

Now to the main reliefs sought in that motion which are as follows

1. An order of Certiorari to bring before the court the ruling of the Area Court Grade 1 on the 12th day of September 2022 for the court to quash for lack of jurisdiction and for leave of fair hearing contrary to section 33(6) of the CFN 1999 as amended.
2. An order of court that the ruling of Area court Kubwa is illegal, null and void for leaving its jurisdiction and for being totally deficient and lacking in fair hearing.

I asked this question by the order sought here above is it for fundamental rights enforcement or for judicial review? Let's forget the heading but we talk of the substance that is the question this court needs to resolve.

From the clear provision of the order sought herein, is for the court to review the decision of the trial court Grade 1, Kubwa and not enforcement of the Applicant fundamental rights as envisaged by the applicant. And in reviewing the decision of the ruling of Area court grade1, the leave of this court must be sought and obtained in accordance to the order 44 rule 3 (1) of the FCT High court civil Procedure Rule 2018. It is to be noted that, a judicial review is the supervisory jurisdiction of the High court exercised in the review of proceedings, decisions and acts of inferior court and tribunals and Acts of government bodies. The remedies available are for order of mandamuns, cartiorari and prohibition and also the writ of habeas copus.

In judicial review the court is usually concerned with the legality and not with the merit of the proceedings, decisions and acts of the affected inferior court, tribunal and government bodies. See A.G.B. PLC V Nwaigwe (2011)7NWCR P380 and Oredoyin V Arowolo (1989)4 NWCR (PT115)173.

Therefore, by the submission of the learned counsel to the 1st respondent/applicant that failure to obtain leave as required by the rules of the court is a fundamental one Therefore, failure to obtain leave where leave is required is fatal because such required leave of court is a condition precedent to the jurisdiction of the court to entertain the case.

It is trite that he who comes to equity must come with clean hand and must do equity

See Illyaso V Ahbadu (2011) 13NWCR (PT1264) P 236 No party will be allowed to benefit from his wrongful act or doing. See Umaru v Pam (2010)2 NWCR(PT1178)404. That law, though not about morality of what is right or wrong will never allow itself to be used as an engine of fraud by one party against the other, particularly on a court of law which is as well a court of justice and equity.

Under the rules of legal professional conduct and ethics, it provides that we always should uphold and observe the rule of law promote and foster the cause of justice, maintain a high Standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner. See N.B.A V Nwoye (2016) 11NWCR (PT1522). I said all these because of the procedure used by the applicant counsel to commence this proceeding. The procedure is wrong completely.

In view of the foregoing I shall agree with the submission of the 1st respondent/Applicant, this suit falls strictly under judicial and is review not the issue of fundamental rights as stated and captured on the originating motion.

In view of the above, i hold that the entire proceedings cannot stand hence I uphold the preliminary objection and hold that this court lacks the jurisdiction hence this case is hereby struck out with a cost of N100,000:00 awarded to the 1st respondent/applicant.

This is my ruling.

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Hon. Justice A. Y. Shafa

Appearance:

- 1. Hafsat Aliyu for the 1st Respondent**
- 2. Claimant counsel absent**