

IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENINJUDICIAL DIVISION,
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, THE HON. JUSTICE V.O. EBOREIME, JUDGE
SITTING IN HIGH COURT NO. 12, BENIN CITY
ON FRIDAY, THE 22ND DAY OF JULY, 2016

SUIT NO: B/606^M/2012

BETWEEN:

BARR. TOM OAIKHINA MR. LUCKY EDMHEN MRS. KATE ALETOR	}	í	APPLICANTS
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AND

1. LAPO MICROFINANCE BANK LTD. 2. MR. JAMES IGBINOVIA	}	í	RESPONDENTS
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JUDGMENT

The Applicants' Motion on Notice was filed on the 29th day of October, 2012 and brought pursuant to:

1. Order II Rules 1, 2 and 3 of the Fundamental Rights (Enforcement Procedures) Rules 2009 as preserved by Section 315 of the 1999 Constitution
2. Inherent jurisdiction of the Honourable Court as preserved by Section 6(6) of the 1999 Constitution.

The Applicants filed their Amended Statement on the 9th day of April, 2014.

The reliefs stated by the Applicants therein are as follows:

1. A DECLARATION that the arrest and detention of the Applicants by the Respondents at the 1st Respondent's branch office located at 73,

Murtala Mohammed Way, Benin City on 31st day of August, 2012 by the 2nd Respondent and his security personnel in the employment of the 1st Respondent is in violent violation of the Applicants' right to personal liberty guaranteed under Section 35 of the Constitution of the Federal Republic of Nigeria 1999 and Articles 5/6 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10, Laws of the Federation of Nigeria, 1990.

- (A) N50, 000,000.00 (Fifty Million Naira) being exemplary and aggravated damages against the Respondents for the illegal and unconstitutional violation of the Applicants' rights.
- (B) Such further or other orders as this Honourable Court may deem fit to make in the circumstances.

The two grounds upon which reliefs are sought are as follows:-

- (i) The arrest and detention of the Applicants by the Respondents branch office located at 73, Murtala Mohammed Way, Benin City by the 2nd Respondent and his security personnel in the employment of the 1st Respondent are contrary to Section 35 of the Constitution of the Federal Republic of Nigeria 1999 and Articles 5 and 6 of the African Charter on Human and Peoples' Rights (Retification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria, 1990.

- (ii) The Applicants are entitled to be compensated in damages for the unlawful and flagrant violation of their constitutional rights.

In support of the application were 21-paragraph, 20-paragraph and 19-paragraph affidavits of the 1st, 2nd and 3rd Applicants respectively and a written address.

On the 5th day of December, 2014, the 2nd Respondent filed the Respondents' 46-paragraph, 51-paragraph and 50-paragraph Counter Affidavit to the 1st, 2nd and 3rd Applicants affidavits in support of Applicants' Motion on Notice respectively. He attached two exhibits each to the counter affidavits while G.A. Asemota, Esq. filed the Respondents' written address in support of their counter affidavits.

On the same 5th day of December, 2014, G.A. Asemota, Esq. filed on behalf of the Respondents, a Notice of Preliminary Objection to Applicants/Respondents' Joint Amended Statement and Motion on Notice on the following grounds:

1. That the particular relief sought by the applicants/respondents in the enforcement of their fundamental human rights under S. 35(1) of the 1999 constitution and Articles 5 and 6 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act Cap. 10 LFN 1990 as contained in their statements are such that can only be enforced against the government or its agents and not against private individual and corporate body like the respondents/applicants herein.
2. That the cause of action (arrest and detention) as alleged by the applicants/respondents in the said applicants' amended joint Statements

and Motion on Notice filed on 9/4/14 granted on 28/11/14 by order of this Honourable Court being false imprisonment in tort can only be brought under the general civil cause list where they can be subjected to cross examination.

3. That this Honourable Court lacks jurisdiction to entertain the said reliefs in this suit in view of the fact that the alleged arrest and detention (false imprisonment) can not be brought under the Fundamental Rights (Enforcement Procedure) Rules 2009 by the applicants/respondents herein.
4. That the applicants' suit is incompetent as it is improper for the applicants/respondents to be joined together for the purpose of securing enforcement of their fundamental rights allegedly breached by the respondents/applicants.
5. That the joint enforcement of the applicants' alleged breach of their fundamental rights in this suit is wrong in law.
6. That the filing of independent and separate individuals' affidavits by the applicants/respondents in support of their amended joint statement and motion on notice for the enforcement of the alleged breach of their fundamental right is defective and therefore robbed this Honourable Court of its jurisdiction to entertain same.

And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances of this case.ö

The Notice of Preliminary Objection was supported by an 8-paragraph affidavit Deposited to by the 2nd Respondent, an Exhibit and a written address also prepared by G.A. Asemota, Esq. the learned counsel to the Respondents. This Notice along with the Affidavit in Support, Written address, Counter affidavit (and written address) was served on the Applicants/Respondents on 15th December, 2014. (See P.285 of the case file).

It is quite elementary that when Notice of Preliminary Objection is raised which especially touches on jurisdiction, it must be determined first since anything done without jurisdiction by the Court, no matter how well conducted would amount to an exercise in futility. See the locus classicus case of MADUKOLU V. NKEMDILIM (1962) ANLR. 581. See also TIJANI AMOS & ORS. V. ADEDOKUN ADEDEJI & ORS. (2003) NSCQR VOL. 15 PAGE 132 at p. 144, per Dahiru Musdapher, JSC.

The Applicants did not join issues with the Respondents on this Notice of Preliminary Objection. As deprecating as that act of the Applicants may be, the Court cannot hold that that Applicants have conceded to the issues raised on the Preliminary Objection. The position of the law is that this Court is enjoined to consider the objection on its merits on the materials placed before it by the parties. For this position of the law, see FEDERAL REPUBLIC OF NIGERIA V. RAJI SHADE TAWAKALITU & ORS. (2013) Vol. 223 LRCN (PT. 2) PAGE 36 at page 42 ZJJ, per Chukwuma-Eneh, JSC.

On his ground 1, it is the contention of the Respondents that Section 85 (1) of the 1999 Constitution and Articles 5 and 6 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act are not couched to allow persons seek reliefs against individuals but against the state or government. While Section 35 (1) of the 1999 Constitution and Article 6 of the African Charter deal with the right to personal liberty, Article 5 of the Charter deals with the right to the respect of the dignity of the human being. A careful consideration of the wordings of this Section and Articles does not limit such violation of such right actionable against the government or state only, as argued by the learned counsel to the Respondents. The Supreme Court clearly held that individuals can be challenged for infraction of their fundamental rights of other persons. Femi Falana in his book Fundamental Rights Enforcements in Nigeria, 2nd Edition, at pages 238 and 239 reproduced the decision of the Supreme Court in ABDULHAMID V. AKAR (2006) 13 NWLR (Pt. 996) thus:

öThe position of the law is that where fundamental right are invaded not by government agencies but by ordinary individuals, as in the instant case, such victims have rights against the individual perpetrators of the acts as they would have done against state action.ö

From the foregoing therefore, I hold that ground one of the preliminary objection by the Respondents is incompetent.

On their ground two, it is to the effect that the cause of action (arrest and detention) of the Applicants fall under false imprisonment in tort. The learned

counsel to the Respondents submitted that this Court lacks jurisdiction to consider it under the Fundamental Right Enforcement Procedure Rule. I have considered the cause of action. I saw that it is the case of the Applicant that it was the Respondent who arrested and detained them at their office. From an action in tort for false imprisonment, the Claimant must prove that the Defendant was actively involved in setting the law in motion against him. This is a trite position of the law. See the Supreme Court case of DANIEL OKONKWO VS FRED OGBOGU AND ANOR NSCQR (1996) PAGE 285 where the Court held at ration 3 thus:

öTo succeed in an action for false imprisonment, the Plaintiff must show that it was the defendant who was actively instrumental in setting the law in Motion against him.ö

It is my firm view therefore that the Applicant properly instituted this present action under the FREP RULES. I hold therefore that the objection of the Respondent on ground two is therefore incompetent.

On the Respondentsø ground three, it is a rephrase of ground two. Ground two having been held by me to be incompetent, I also hold that Ground 3 is incompetent based on the reasoning I enunciated for ground two.

On the Respondentsø Ground Four, it challenges the competence of the suit of the Applicants as it is improper for the Applicants to be joined together for the purpose of enforcing their fundamental rights. The Applicants here have complained against the same arrest and detention which occurred on the same day,

same time and same *locus*. Filing a single action, I believe, cannot be a ground to frustrate the cause of the Applicant. The case of DAVID ONOJA OGWUCHE AND ORS VS. UNIVERSITY OF AGRICULTURE, MAKURDI AND ORS. (1982) 3 NCLR 915 at 997, the Court allowed 102 applicants to file one action under the FREP Rules for their either rustication or expulsion from the University. I hold therefore that Ground Four of the Preliminary Objection is incompetent.

On the Respondents' Ground Five of the Preliminary Objection, it is akin to ground four above which complained of the joint enforcement of the applicants' alleged breach of their Fundamental Rights. Having struck out Ground Four, I hold that Ground Five cannot stand based on my reasoning in striking out ground four.

Finally the Respondents' Ground six of their Preliminary Objection complains of the separate individuals' affidavit by the Applicant in support of their amended joint Statement. The Learned Counsel to the Respondents argued that it is defective and robs this Court of its jurisdiction; that it is a violation of Order IX Rule 1 (1) of the FREP Rules which provides for the mode of commencement of an application of this nature. With due respect, this Order IX deals with "Effect of Non-Compliance" and not "mode of Commencement" which is dealt with Under Order II (2) & (4) of the FREP Rule. In any case, having allowed a Joint Statement, the individual affidavit of the Applicants cannot be a ground to nullify the suit. This ground six is equally incompetent.

The Preliminary Objection on the whole is incompetent and same is struck out for want of merit.

I will now turn to the substantive suit. On Monday, the 11th day of April, 2016 when the Learned Counsel to the Respondent adopted his written address against the substantive suit, the Learned Counsel to the Applicants was not in Court. Based on the application of the Counsel in Court that day, this Court deemed the Written Address of the Learned Counsel to the Applicant as properly adopted. This is in tandem with the provisions of Order XII (3) of the FREP Rules.

The grouse of the Applicants are founded on the supposed breach of the Fundamental Human Rights guaranteed under Section 35 of the 1999 Constitution and Articles 5 and 6 of the African Charter. These provisions deal with the Right to Personal Liberty and Right to the Dignity of the Human Person respectively.

The facts of the case of the Applicants can be seen from their respective affidavits at pages 200 ó 208 of the case file. The summary of it is this. The 1st Applicant said that on the 31st day of August, 2012, he received a distress phone call from the 3rd Applicant that the management of the 1st Respondent locked her up in their premises; that he went to the 1st Respondent's office and saw the 3rd Applicant indeed locked up; that on his enquiry, he was shown the 2nd Respondent who admitted to the act on the ground that the 3rd Applicant was a guarantor for a loan which interest had not been paid completely; that he appealed to the 2nd

Respondent who initially ordered him out but later gave an order that his staff lock them up; that by his rare feat of gymnastics, he escaped and reported the case at the Esigie Police Station; that three Policemen were given him to rescue the 2nd and 3rd Applicants; that the 2nd Respondent subsequently locked him, his clients and the policemen up; that it took the intervention of a stranger before the 2nd Respondent and his staff allowed them to go; that they all wrote statement at the Police Station on the 31st day of August, 2012. This is the central facts concerning the 1st Applicant.

The case of the 2nd Applicant is summarized as follows from his 20-paragraph affidavit. That on the 31st day of August, 2012, he got a distress call from the 3rd Applicant that the management of the 1st Respondent had locked her up at their branch office; that the 1st Applicant mysteriously escaped being locked up and came later with three policemen; that the 2nd Respondent resisted arrest and locked all of them up and threw the key to the security man downstairs; that they later wrote their statements at the Police Station.

The case of the 3rd Applicant as can be seen from her affidavit to is summarized thus. That on the 31st day of August, 2012, the staff of the 1st Respondent stormed her shop/ business premises and pushed her into their vehicle and took her to the 1st Respondent's office; that she was informed by them that she stood as guarantor to the 2nd Applicant's wife, one Mrs. Edomhen Precious Abieyuwa; that since they could not reach the said Mrs. Edomhen Precious

Abieyuwa, they insisted on taking her away; that on getting to their office, the 2nd Respondent ordered a staff to lock the gate to prevent her escape; that she called the 1st and 2nd Applicant; that the 1st and 2nd Applicant came to the office and were subsequently detained along with the three policemen which came with the 1st Applicant; that they all wrote statements at the Police Station on that 31st day of August, 2012.

The case of the Respondents can be gleaned from the facts deposed to by the 2nd Respondent in his counter affidavit against the 1st, 2nd and 3rd Applicants respectively. They are summarized as follows. That the 1st Respondent is a microfinance institution incorporated in Nigeria; that the 1st Respondent gave a credit facility to one Mrs. Edomie Precious Abieyuwa on the 9th day of November, 2011; that the guarantors for the credit facility included the 2nd and 3rd Applicants; that as at 31st August, 2012, the said Mrs. Edomie default of three months installments; that the said Mrs. Edomie Precious Abieyuwa vacated her address without notifying the 1st Respondent; that the 3rd Applicant volunteered to take the 1st Respondent's credit officer, one Mr. Oshoke Aliu to the house of the said Mrs. Edomie Precious Abieyuwa; that when all effort to get the said Mrs. Edomie Precious Abieyuwa failed, the 3rd Applicant voluntarily decided to come to the office to explain the whereabouts of the said Mrs. Edomie Precious Abieyuwa; that the office, the 3rd Applicant and himself exchange pleasantries; that on receiving phone call from the said Mrs. Edomie Precious Abieyuwa, the 3rd Applicant went

to the waiting room of the 1st Respondent to wait for the said Mrs. Edomie Precious Abieyuwa; that the 1st Applicant came to the office shortly after who introduced himself as the husband of the 3rd Applicant; that the 1st Applicant openly reprimanded the 3rd Applicant for standing as guarantor to anybody; that later, the 3rd Applicant brought in the 2nd Applicant whom she introduced as the husband of the said Mrs. Edomie Precious Abieyuwa; that while he was discussing with the 2nd Applicant on how to settle the indebtedness of his wife, the 1st Applicant flared up and started bombarding him with vituperative and cacophony words; that the 1st Applicant refused to his terms of five days to pay the indebtedness and insisted on one month; that the 1st Applicant left in anger boasting that he would here from him; that the 2nd and 3rd Applicants begged him to ignore the temperamental disposition of the 1st Applicant; that not quite five minutes after the 2nd and 3rd Applicants left his office, the three Applicants resurfaced again in company of three other strange persons in plain cloths who introduced themselves as police officers from Esigie Police Station as the 1st Applicant had gone to the Police Station to intimidate him; that when the Police could not placate the temperament of the 1st Applicant, they left the office unhindered having informed the 1st Applicant that he had not committed any offence to warrant his arrest; that five days later, the said Mrs. Edomie Precious Abieyuwa came to the office (that is 5/9/2012) to pay the outstanding installment and an advance for part of the month of September, 2012, that when the 1st

Applicant knew of this fact, he caused the Police to come again from the Esigie Police Station to serve him a letter of invitation on the 15th day of September, 2012; that the Police refused to detain him as requested by the 1st Applicant; that he made formal statement to the police; that till date, the police have not invited him again over the false allegation reported against him by the 1st Applicant; that he never locked up the Applicants on the 31st day of August, 2012. The facts that the 2nd Respondent deposed to in his counter affidavits against the 2nd and 3rd Applicants' affidavits are *im pari materia* with the summarized facts above.

I have painstakingly gone through the affidavit evidence of the Applicants in support of their application and the counter affidavit of the Respondents. I find it extremely implausible the facts deposed to that the 2nd Respondent arrested and detained not only the Applicants herein but other three Police Officers from the Esigie Police Station and the 2nd Respondent would not be arrested, detained or arraigned in a Court of competent jurisdiction for obstructing justice.

The fact deposed to by the 2nd Respondent is more logical and probable and I believe those facts. The Respondents through the 2nd Respondent deposed to facts in their counter affidavit that through the incidence happened on the 31st day of August 2012, he only went to make statement at the Police Station on the 15th day of September, 2012 on invitation by the Police when the 1st Applicant insisted he must be arrested; he also deposed to facts on oath that till date the Police has never invited him again or arrested or detained him over the alleged complaint of the

Applicants that the Respondents arrested and detained them and three policemen in their branch office. Surprisingly, the Applicant did not file any address on pints of law or a further affidavit as required by Order II Rule 7 of the FREP Rules. The law on this is trite which is that unchallenged Counter affidavit is deemed admitted as being correct and the Court is at liberty to accept it. See HENRY STEPHENS ENGINEERING LTD. V. S. A. YAKUBU (NIG.) LTD. (2009) NSCQR VOL. 38 PAGE 392 where I. F. Ogbuagu, JSC held at page 400 thus:

“It is now settled that failure to swear to a further affidavit where there is a Counter affidavit which is unchallenged, it is deemed that the Counter-affidavit is admitted as being correct. In other words, where there is an unchallenged Counter-affidavit evidence, the Court is at liberty to accept it as true and correct.”

From the foregoing and the affidavit evidence of both the Applicants and the Respondents respectively, I am of the view that the Respondents, especially the 2nd Respondent did not arrest or detain the Applicants at the 1st Respondent’s branch office located at 73, Murtala Mohammed Way, Benin City on the 31st day of August, 2012.

I am equally of the view that the Respondents did not breach the Provision of Section 35 of the Constitution of the Federal Republic of Nigeria, 1999 and Articles 5 and 6 of the African Charter on Human and Peoples’ Rights

(Ratification and Enforcement) Act , Cap.10, Laws of the Federation of Nigeria, 1990.

On the whole, I hold that the application of the Applicants fails. The prayers therein are therefore refused by me as the ground for the application is not proved. The action is therefore dismissed by me. No order as to cost.

HON. JUSTICE V. O. EBOREIME
JUDGE
22ND JULY, 2016

COUNSEL:

R.O. IMAFIDON, ESQ. FOR APPLICANTS