IN THE HIGH COURT OF JUSTICE
IN THE AGENEBODE JUDICIAL DIVISION
HOLDEN AT AGENEBODE
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON MONDAY THE
19TH DAY OF JUNE, 2017.

BETWEEN: SUIT NO: HAG/3/FHR/2017

CHIEF MATTHEW OSESEAMHE í í í í í í í í í ..... APPLICANT

AND

1. COMMISSIONER OF POLICE EDO STATE
2. DIVISIONAL POLICE OFFICER, AGENEBODE
3. THE DIRECTOR OF PUBLIC PROSECUTION EDO STATE.

} RESPONDENTS

RULING

This is a Ruling in respect of an application for the enforcement of Fundamental Rights brought pursuant to Order 11, Rules 1, 2, 3, Order Xi of the Fundamental Rights (Enforcement Procedure) Rules 2009, section 35 of the Constitution of the Federal Republic of Nigeria 1999 as amended, the African Charter on Human and Peopleøs Right and under the inherent jurisdiction of this Court.

The applicant filed this application before this Court for the enforcement of his fundamental right to personal liberty. The application is supported by a statement setting out the reliefs sought and the ground for the reliefs sought by the Applicant as follows:

1. **A DECLARATION** that the threat by the 1st and 2nd respondents to arrest the applicant for the offence of conduct likely to cause a breach of the peace

when no complaint was made against him is unlawful, unconstitutional and therefore constitutes an infringement on his fundamental right to personal liberty as guaranteed by section 35(1) of the 1999 Constitution of the Federal Republic of Nigerian (FRN) as amended;

2. **A DECLARATION** that the threat by the 1st and 2nd respondents to arrest the applicant for the offence of conduct likely to cause a breach of the peace based on the legal advice of the 3rd respondent is unlawful, unconstitutional and therefore constitutes an infringement on the applicantøs fundamental right to personal liberty as guaranteed by section 35(1) of the 1999 Constitution of the Federal Republic of Nigerian (FRN) as amended;

3. **A DECLARATION** that the legal advice given by the 3rd respondent contained in letter dated 5/12/2016, which forms the basis of the threat by the 1st and 2nd respondent their agents, servants and privies to arrest the applicant is in breach of the applicantøs right to fair hearing and constitutes an infringement of the Applicantøs fundamental rights as guaranteed by sections 36(1) and (5) of the 1999 Constitution of the Federal Republic of Nigeria as amended;

4. **A DECLARATION** that the legal advice given by the 3rd respondent contained in letter dated 5/12/2016, which forms the basis of the threat by the 1st and 2nd respondent their agents, servants and privies to arrest the applicant, in so far as it relates to the applicant, is calculated to deprive the applicant of his fundamental right to personal liberty as guaranteed by section 35(1) of the 1999 Constitution of the Federal Republic of Nigerian (FRN) as amended and therefore void to that extent;

5. **AN ORDER** of perpetual injunction restraining the 1st and 2nd Respondents jointly and severally by themselves, servants, agents and or privies from arresting, detaining, harassing or intimidating the applicant and his family in any manner whatsoever, based on the 3rd respondentøs legal advice in respect of charge no MAG/5c/2016 or any complaint connected with the charge;

6. AN Order of Court setting aside the legal advice given by the 3rd respondent in so far as it affects the applicant for being in violation of his rights as guaranteed by the 1999 constitution; and

7. For such further order or orders as this Honourable Court may deem fit to make in the circumstances of this case.

The grounds upon which the reliefs are sought are as follows:

1. By virtue of section 35(1) of the 1999 constitution of the Federal Republic of Nigeria as amended, every person shall be entitled to his personal liberty and no person shall be deprived of such liberty except as permitted by law;

2. No Nigerian law permits the Respondents to unlawfully arrest and deprive any law abiding citizen of Nigeria of his fundamental right;

3. The legal advice of the 3rd respondent is unwarranted, biased, not based on facts, arbitrary, unconstitutional and therefore null and void; and

4. That unless and until this Honourable court intervenes, the Applicant and other innocent citizens would continue to suffer untold hardship at the whims and caprices of the Respondents.

The learned Counsel for the Applicant, S.K.Mokidi Esq. also filed a supporting affidavit of 19 paragraphs and a Written Address. At the hearing, he relied on the supporting affidavit and adopted his written address.

The Respondents were duly served with all the Court processes and one Simeon Ozabor Esq., a Police lawyer, filed a Counter Affidavit and a Written Address on behalf of the 1st and 2nd Respondents. The 3rd Respondent did not file any court process neither was there any representation on his behalf.

The facts of the case, as garnered from the Applicantsøaffidavit, are that while a criminal ***charge No: MAG/5C/2016 COP v. Agwayokha Omogbe & 3 others*** was pending before the Agenebode Magistrate Court, the learned magistrate referred the matter to the 3rd respondent for legal advice because of one of the counts which ousted his jurisdiction to try the matter.

The applicant was not charged along with the other accused persons in the original charge. But when the 3rd Respondent gave his legal advice, he directed the

1st & 2nd Respondents to õre-arrestö and arraign the applicant and charge him along with Agwayokha Omogbe.

Pursuant to that advice, the 1st and 2nd respondents have made some attempts to arrest the applicant by going to his house on a daily basis, hence this application. The applicant has alleged that the threat to arrest him by the 1st and 2nd Respondents and their agents based on the advice of the 3rd respondent is calculated to deprive him of his personal liberty and is unwarranted, unlawful and contravenes section 35(1) of the 1999 constitution.

In his Written Address, the learned counsel for the Applicant relied on all the paragraphs of the supporting affidavit and identified a sole Issue for Determination as follows:

> ***"Whether from all the circumstances of this case this court ought not to grant the reliefs sought by the applicant".***

Arguing the sole Issue for determination, learned Counsel submitted that this Court has both the requisite Judicial and statutory powers to grant this application. He referred to ***Order 11 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rule 2009*** which provides as follows:

> ***"Any person who alleges that any of the fundamental Rights provided for by the constitution or African Charter on Human and peoples' Rights (ratification and Enforcement) Act and to which he is entitled, has been, is being or is likely to be infringed, may apply to the court in the state where the infringement occurred or is likely to occur, for redress…"***

Furthermore, he posited that ***section 46 of the 1999 Nigerian Constitution*** confers jurisdiction on any High Court in a State in matters of fundamental rights irrespective of who is affected by an action founded on such rights.

Counsel maintained that Article 7(a) of the African Charter on Human and Peoplesø Rights has also guaranteed the right of every individual to appeal to the competent National Organ against acts of violation of their fundamental rights as recognized by conventions, laws, regulations and customs in force.

He contended that S.46 (1) of the 1999 Constitution cited above specially empowered this Court to entertain and grant this kind of application as Courts of

law are Defenders of Human Rights. He relied on the decision of the Court of Appeal in the celebrated case of: ***ISUMA VS. GOVERNOR OF EBONYI STATE (2007) WRN AT 170*** where the Court held as follows:

> ***"Section 46 of the 1999 constitution is a special provision which deals with matters of fundamental rights irrespective of who is affected by an action founded on such rights. Section 42 of the 1979 constitution is now 46 of the 1999 constitution. In short, a person whose fundamental right is breached or to be breached may apply to a High Court or Federal High Court in that state for redress. See JACK VS. UNIVERSITY OF AGRICULTURE, MAKURDI (2004) 5 NWLR (PT. 865 and TONY ANTHONY V. NDIC (2011) ALL FWLR (PT.598) P. 909 at 929."***

He further referred to: Section 35(1) of the 1999 constitution (as amended) which provides inter alia:

> ***Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law:***
> ***(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;***

He submitted that by the above provision, the applicant is entitled to his liberty and he cannot be denied of that right except for the purposes stated in section 35(1)(c). He asserted that the courts have always frowned at people who indulge in arresting and detaining innocent citizens without just cause as in this case. He posited that our courts have always reiterated that arrests by policemen like the Respondents, over allegation of crimes must be founded on truth and without intent to humiliate an opponent, or to deny citizens of their personal liberty.

Counsel maintained that the police must act bona fide, lawfully, and their action must be devoid of malice, vindictiveness or mischief. He referred to the case of: ***Duruaku v. Nwoke (2016) All FWLR (pt.815) 351 at 395,*** where the Court of Appeal held that the mere allegation of crime or wrong doing against a suspect, irrespective of its seriousness, cannot operate to curtail the fundamental rights of

the suspect nor can it operate to justify the incarceration and torture of the suspect. According to the Court, the person who infringes or breaches the constitutional rights of the applicant has the onus to justify such breaches.

Furthermore, he maintained that an arrest pending investigation is unconstitutional and that the Court went further to state that where as in the instant case, the Respondents failed to investigate the offences the appellants allegedly committed before detaining them, the trial court erred by not granting the damages sought for infringement of their constitutional rights.

For this view, Counsel relied on paragraphs 7-24 of the supporting affidavit and the cases of: ***Ogor v. Roland & C.O.P. 91983) NCR 342*** **ETEIDUNG NTIENSE S.J. NDA & 9 ORS VS. BRENDA GEORGE OBOT & 2 ORS. (2009-10) CHR (CASES ON HUMAN RIGHT) 190 RATIO 1,2,3,4 and 5 at PAGES 192-196.**

He submitted that it is trite law that where there is evidence of threat to arrest or arrest of an applicant like in the instant case, it is for the Respondents to show that the threat to arrest or the arrest itself is lawful. See: **DURUAKU V. NWOKE (supra) at p. 399; FAJEMIROKUN v. COMMERCIAL BANK. (C.L.) LTD (2002) 10 NWLR (PT.774) 95.**

He posited that the Respondents may argue that by S.4 of the Police Act, they have a duty to apprehend offenders but he submitted that before the Police can exercise the power to arrest and detain, there must be <u>a valid criminal complaint</u> against the person. He maintained that the mere allegation of crime or wrong doing against a suspect cannot operate to curtail the fundamental rights nor can it operate to justify the arrest. For this view, he relied on the cases of: **Daruaku v. Nwoke (2016) All FWLR (pt. 815) at 395;** and **Ogor vs. Roland and C.O.P (1983) NCR 343.**

Learned counsel contended that from the affidavit evidence before court there is nothing to suggest the offence which the applicant committed. He said that Exhibit M3 is the report by the police including the statement of the complainant (John Onyenye) in: charge No MAG/5C/2016. He said that there is nothing in Exhibit M3 suggesting that any complaint was laid against the applicant to warrant

the conclusion by the 3rd respondent that the applicant should be arrested and arraigned along with Agwayokha.He argued that since the applicant was never arrested, invited or requested to make statement by the police, Exhibit M1 cannot talk of a re-arrest.

He submitted that by section 35(1) (c) of the Constitution, a person can only have his liberty curtailed upon reasonable suspicion of having committed a criminal offence. For this, he relied on the case of: **Agundi v. Commissioner of Police (2013) All FWLR (pt. 660) p. 1247 at 1297.**

He submitted that Exhibit M1, in so far as it affects the applicant is in bad faith, arbitrary and not based on materials contained in Exhibit M3 and therefore void. Furthermore, he argued that since Exhibit M2 shows clearly that the applicant was not even charged before the court, the recommendation as it affects the applicant is ultra vires the 3rd respondent who has a duty to act bonafide.

He posited that there was no complaint against the applicant and that the applicant was never given any opportunity to be heard. He urged the Court to hold that Exhibit M1, in so far as it is intended to circumscribe the liberty of the applicant is void.

In conclusion he submitted that in the light of exhibit M, M1 and paragraphs 16 and 17 of the supporting affidavit, the threat to arrest the applicant is real and in the absence of any complaint or allegation of crime against the applicant this Honourable court being the protector of the peopleøs right has a duty to protect the fundamental right to personal liberty of the applicant.

At the hearing of this application, the learned counsel for the Applicant raised a preliminary objection to the Counter Affidavit of the 1st and 2nd respondents on the ground that it was filed outside the period of stipulated under the rules of Court without the leave of Court for an order to extend the time. He concluded that there is therefore no counter affidavit before the Court.

He finally urged the Court to grant the application.

In opposition to the application, the learned counsel for the 1st and 2nd respondents, S.Ozabor Esq. filed a 17 paragraph affidavit and a Written Address of Counsel.

In his Written Address, the learned Counsel for the 1st and 2nd respondents relied on all the paragraphs of the counter affidavit and the formulated two issues for determination as follows:

ISSUE ONE

"Whether or not 1st to 2nd respondent have power to invite the applicant based on allegation of conduct likely to cause the breach of peace.

ISSUE TWO

Whether any person accused of a felony can hide under Fundamental Right."

ISSUE ONE:

He submitted that on the strength of complaint by information to the 1st and 2nd respondents against the applicant at the Agenebode Division of Edo State where all the accused persons were arrested and arraigned in a court of competent jurisdiction except the applicant who is on the run, to be arraigned when he is arrested along with other suspects based on the D.P.Pøs advice.

Counsel referred the Court to the case of: ***FAYEMI KORUN VS NIG. LTD (2002) 100 NWLR*** (sic) and urged the Court to hold that the 1st and 2nd respondents have the power to arrest the applicant for the allegations against him. He therefore submitted that the applicant is not entitled to any relief sought.

Furthermore, he submitted that section 214 (2) 6) of the amended 1999 constitution provides that, the members of Nigeria police force shall have such power and duties as may be conferred upon them by the law. He maintained that the police Act Cap p1q LFN 2004 among other statutes, confer duties and powers on the police see 524 CFRN 1999 559 (1) C.P.A. and SZ4 (1) (6) of the police Act Cap PIQLFN.

He also referred the Court to: ***FAWEHIMI VS IGP (2002) SC (PTI) P63; and FAWEHIMI VS AKILU (1987) NWLR (PT67) 797***. He posited that once a complaint of information received by the police relating to the commission of a crime is received from the general public, the Police is duty bound to detect the perpetrator(s) by way of investigation. He maintained that an Invitation or arrest is not a breach of fundamental right.

ISSUE 2 WHETHER ANY PERSON ACCUSED OF A FELONY CAN HIDE UNDER FUNDAMENTAL RIGHT

Counsel submitted that fundamental right is not a canopy for any person who is reasonably suspected to have committed an offence to hide and referred to the case of: ***Dukubo Asari Vs FRN (2007) Vol. 152 LRCN pg 116 pg 150 paragraph F-K)***

He submitted that if the Court grants the application it will defeat the aim of Justice because whoever commits an offence will run under fundamental human right. He urged the Court not to grant the relief sought by the Applicant, especially when the alleged offence committed by the applicant is such a grievous allegation which is now pending before a competent court of jurisdiction since the case involves conduct likely to cause breach of peace.

Counsel referred to the case: ***DIMUJU VS Director of SSS 2006 AFNLR PT339***: He posited that damages are not given in vacuum but based on sound and well settled principles.

He submitted that a private person or individual who has simply laid a complaint or reported a matter to the police cannot be held liable for breach of the fundamental rights of the person arrested. See: ***GBAFOR V OGUNBUREGUI (1961) ALL NLR***

Furthermore, Counsel referred to the Court of Appeal decision, in ***EZEDUKWA V MADUKA (1997) 8 NWLR Pt 518 668*** where as TOBI JCA (as he then was) held thus:

> ***"It is most elementary law that there cannot be agency relationship between a private citizen and a police officer in the performance of his duties under section 4 of the police Act, Cap 20, laws of the Federation of Nigeria, 1990 or any other enabling law to the same effect. The transient relationship between a complainant and a police officer in the course of arresting, investigation and prosecuting a case of does not, in law, ripen into agency relationship".***

Counsel submitted that it is the duty of the police to investigate and arrest citizens who are suspected to have committed one offence or another and that the facts before this Court, did not disclose any breach of the Applicantøs fundamental rights by the 1st to 2nd Respondents.

He posited that, if the Applicant was arrested by the 1st to 2nd Respondents, they are law enforcement agents who are not under the operation and control of any person.

Counsel submitted that in enforcing fundamental rights, the burden is on the applicant to establish a breach. See the case of: ***FAJEMIROKUN V.***

COMMERCIAL. BANK NIGERIA LIMITED (2009) VOLUME 175 LRCN 99 AT RANTIO 9.

He maintained that there are no facts upon which this Court can exercise such discretion in favour of the Applicant against the 1st to 2nd Respondents as the Applicant have failed to meet the standard. He submitted that the applicant should submit himself for arraignment.

He finally urged the Court to dismiss the application with punitive costs.

Before I go into the merits of this application, it is expedient for me to first determine the validity of the objection raised by learned counsel for the Applicant on the Counter Affidavit filed by the 1st and 2nd Respondents after the expiration of the period stipulated under the rules.

As a matter of fact, ***Order 11 Rules 6 of the Fundamental Rights Enforcement Procedure Rules, 2009***.provides as follows:

> ***"6. Where the respondent intends to oppose the application, he shall file his written address within 5 days of the service on him of such application and may accompany it with a counter affidavit."***

By virtue of the above provision, the Respondents are entitled to file their written address and counter affidavit within five days of the service of the application on them, From the proofs of service contained in the Courtøs file the 1st and the 2nd Respondents were served on the 12th and 10th of April, 2017 respectively. Meanwhile, they filed their Joint Counter Affidavit and Written Address on the 12th of May, 2017, one month after receiving the application. Thus, the processes were filed out of time. The issue now is: What is the effect of this filing out of time without the leave of Court? The learned Applicantøs counsel has seriously contended that the processes are invalid. According to him there is no valid written address and counter affidavit before the Court. The learned Counsel for the 1st and 2nd Respondents in his reply has urged the Court to regard the late filing as a mere irregularity which cannot invalidate the processes.

In recent times, there has been a paradigm shift from the practice of justice by technicality to substantial justice. It is settled law that the Courts must strive to do substantial justice. In the case of: ***B.O.I.Ltd. v Adewale-Adediran (2015) 17 NWLR (Pt.1487) 114 at 118***, **Danjuma J.C.A**. explained the position thus:

"Substantial justice, where possible, must not be allowed to be defeated by irregularities or technicalities that could be cured by the exercise of a court's discretion".

Furthermore, Order 1X of the ***Fundamental Rights Enforcement Procedure Rules, 2009***.provides as follows:

"ORDER IX – EFFECT OF NON COMPLIANCE.

1. Where at any stage in the course of or in connection with any

proceedings there has, by any reason of anything done or left undone, been

failure to comply with the requirement as to time, place or manner or form,

the failure shall be treated as an irregularity and may not nullify such

proceeding."(underlining mine).

In the recent case of **:** ***Enukeme vs. Mazi (2015) 17 NWLR (Pt.1488) 411 at 417***, the Court of Appeal, Owerri Division held that the provision of Order 1X Rule 1, will remedy an irregularity relating to failure to follow the time line stipulated under the rules.

Again, in the case of: ***Nnamdi Azikiwe University vs. Casmir Nwafor (1999) 1NWLR (Pt.585) 116 at 133, Salami JCA*** explained thus:

> ***"…it seems to me that in the matter of enforcement of the fundamental rights, courts are less slavish to the rules of court rather than use them as hand maiden to do substantial justice."***

In view of the foregoing, I am in agreement with the learned counsel for the 1st and 2nd Respondents that the failure to file the said processes within time cannot invalidate them. In the interest of justice, the Court will exercise its discretion to extend the time and to deem the said processes as properly filed and served.

Coming to the merits of the application, I have carefully considered the facts contained in the supporting affidavit together with the submissions of learned counsel for the parties.

As earlier observed, the 3rd Respondent did not file any process to challenge this application. So on the part of the 3rd Respondent, the facts as disclosed by the Applicants have not been controverted. It is settled law that when a respondent fails to file a counter affidavit, he is deemed to have admitted the facts contained in the affidavit in support of the application. See: ***Nwosu V Imo State Environmental Protection Agency 1990 2 NWLR (Pt.135), 688; and Egbuna V Egbuna 1989 2 NWLR (Pt. 106) 773, 777.***

On the above authorities, the 3rd Respondent is deemed to have admitted all the facts as contained in the Applicantsøaffidavit in support of the application.

However, the mere fact that the 3rd Respondent is not contesting this application does not mean that the application against him will automatically succeed. The Court is duty bound to consider the merits of the entire application more so, since the 1st and 2nd Respondents have put up a stiff opposition.

In a nutshell this application is actually predicated on the legal advice given by the 3rd respondent contained in letter dated 5/12/2016, which forms the basis of the alleged threat by the 1st and 2nd respondents to arrest the applicant purportedly in breach of the applicantøs right to fair hearing and personal liberty as guaranteed by sections 36(1) and 35(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

Learned Counsel for the Applicant has urged the Court to set aside the advice of the 3rd Respondent (Exhibit M1) on the ground that the proof of evidence attached to the application as Exhibit M3 cannot sustain a prima facie case against the Applicant as contained in the advice of the 3rd Respondent. This is the gravamen of the application.

This application raises some issues of great importance in both constitutional law and criminal law. Essentially, it borders on the powers of the 3rd Respondent to issue a legal advice in criminal matters. For the avoidance of doubt, the 3rd Respondent is the Director of Public Prosecution of Edo State. I must state that it is quite an unfortunate development that in a matter of this nature, which directly involves the constitutional functions of the 3rd Respondent, there was no attempt from that office to put up any representation to articulate their position in order to assist the Court to reach a just conclusion.

I have examined the issues for determination as formulated by both learned cousel.Upon a careful examination of the issues formulated, I am of the view that the sole issue for determination formulated by the learned counsel for the

Applicant is germane enough to resolve the matter. I adopt the said issue with a slight modification as follows:

> ***"Whether from all the circumstances of this case this court can grant the reliefs sought by the applicant".***

To resolve the sole issue for determination, it is expedient to commence by examining the provisions of the 1999 Constitution and other relevant statutes on the powers of the Police (1st & 2nd Respondents) and the Director of Public Prosecutions (3rd Respondent) in relation to criminal trials. From the available facts, the 1st and 2nd Respondents are acting based on the legal advice issued by the 3rd Respondent.

<u>POWERS OF THE POLICE IN CRIMINAL TRIALS</u>

On the powers of the Police, Section 214 of the Constitution provides as follows:

"Establishment of Nigeria Police Force.
214. (1) There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof.
Command and Operational use
(2) Subject to the provisions of this Constitution -
(a) the Nigeria Police Force shall be organised and administered in accordance with such provisions as may be prescribed by an act of the National Assembly;
(b) the members of the Nigeria Police shall have such powers and duties as maybe conferred upon them by law;"

Furthermore, ***sections 24 and 25 of the Police Act*** provides as follows:

"PART IV
Powers of police officers
24. Power to arrest without warrant
(1) In addition to the powers of arrest without warrant conferred upon a police officer by section 10 of the Criminal Procedure Act, it shall be lawful for any police officer and any person whom he may call to his assistance, to arrest without warrant in the following cases—
[Cap. C41.]

(a) any person whom he finds committing any felony, misdemeanor or simple offence, or whom he reasonably suspects of having committed or of being about to commit any felony, misdemeanor or breach of the peace;
(b) any person whom any other person charges with having committed a felony or misdemeanour;
(c) any person whom any other person—
(i) suspects of having committed a felony or misdemeanor; or
(ii) charges with having committed a simple offence, if such other person is willing to accompany the police officer to the police station and to enter into a recognizance to prosecute such charge.
(2) The provisions of this section shall not apply to any offence with respect to which it is provided that any offender may not be arrested without warrant.
(3) For the purposes of this section the expression felony, misdemeanour and simple offence shall have the same meanings as they have in the Criminal Code.
25. Power to arrest without having warrant in possession
Any warrant lawfully issued by a court for apprehending any person charged with any offence may be executed by any police officer at any time notwithstanding that the warrant is not in his possession at that time, but the warrant shall, on the demand of the person apprehended, be shown to him as soon as practicable after his arrest."

From the above provisions, it is an indisputable fact that the members of the Nigerian Police Force are empowered to effect the arrest of criminal suspects.

In the very recent case of: ***Eze vs. I.G.P (2017) 4 NWLR (Pt.1554) 44 at pp.50-51, the Court of Appeal, Lagos Division*** held as follows:

> ***"Where the police properly acts in the exercise of its power under section 4 of the Police Act, an arrest made therein cannot constitute a breach of fundamental rights. Consequently, where a citizen is arrested by the police in the legitimate exercise of their duty and on grounds of reasonable suspicion of having committed an offence, he cannot succeed in an action for a breach of his fundamental rights."***

Coming to the powers of the Director of Public Prosecutions of the State, they are enshrined in ***section 211 of the 1999 Nigerian Constitution.***

Section 211 of the Constitution of the Federal Republic of Nigeria, 1999 provides as follows:

"211. (1) The Attorney General of a state shall have power:
(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly;
(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and prohibition of political activities by certain association
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
(2) The powers conferred upon the Attorney-General of a state under subsection 1 of this section may be exercised by him in person or through officers of his department.
(3) In exercising his powers under this section, the attorney-General of a state shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process."

A careful examination of the above provisions will reveal that the powers conferred upon the Attorney General may be exercised by him in person or through the officers of his department. These officers are of course the professional law officers in the Ministry of Justice which includes the Director of Public Prosecutions (DPP).I take judicial notice of the fact that in practice, the actual prosecution of criminal trials where the Ministry of Justice is involved is conducted by the DPP and his team.

In the old case of: ***Attorney General, Western Nigeria vs. The African Press Ltd. & Anor. (1965) 1 All NLR 6***, the Supreme Court held that since section 47 of the Constitution of Western Nigeria authorized the Attorney General to exercise his powers in person or through officers in his Department, a prosecution instituted by the DPP ranked in law as if it had been instituted by the Attorney General personally. In the recent case of***: Nitel vs. Awala (2001) 45 W.R.N 146 at 157, Omage JCA*** posited that:

"It is settled law and practice that the prosecution of a criminal trial in a court of law is by the Director of Public Prosecutions to whom the power of the Attorney General is delegated to prosecute all criminal proceedings in the country. The DPP prosecutes the trial of offences on behalf of the State…The decision thereof to prosecute an offence is done by the State."

It is now settled law that the exercise of these powers to prosecute or discontinue prosecution cannot be questioned by any court. The ***locus classicus*** is

the case of: ***The State vs. S.O.Ilori & Ors (1983) All NLR 84 at 94,*** where ***Kayode Eso JSC*** restated the position thus:

> ***"The exercise of these powers by the Attorney General …cannot be questioned, and subject to the reserved right of his appointor to remove or even reassign him without giving any reason whatsoever for so doing, neither that appointor nor any other person for that matter can question such exercise of his powers."***

In the 3rd Edition of his book titled: ***THE PROSECUTOR IN PUBLIC PROSECUTIONS (at page 52-53)***, a former Director of Public Prosecutions and later, Solicitor General of Lagos State, ***Fola Arthur-Worrey Esq.*** explained the position thus:

> ***"The first and most fundamental consideration of the nature of the DPP's legal advice is of course the realization that the power is in the nature of the exercise of discretion…and he cannot be questioned as to why he has decided to exercise his discretion one way or another by any person or authority. In effect, his decision in this regard is final. This position has the backing of the Supreme Court expressed through a number of decisions."***

The learned author then went on to cite the following decisions: ***State vs. Ilori (1983) NSCC Vol.14, 104; Amaefule vs. State (1988) NSCC. Vol.19, Pt.1, 699; Edet vs. State (1988) NSCC, Vol. 19, Pt.3, 175; Idiok vs. State (2008) 13 NWLR (Pt.1104) 225; and Akpa vs. State (2008) 14 NWLR (Pt.1106) 72.***

In the instant case, the DPP has exercised his discretion to prosecute the Applicant for the offence of: ***Conduct likely to cause a breach of the peace***. He has further directed the police to arrest the Applicant and prosecute him in the Magistrate Court on the draft Charge Sheet exhibited as Exhibit M1.

The Applicant is urging the Court ***inter alia*** to set aside the Legal Advice and restrain the 1st and 2nd Respondents from giving effect to the Legal Advice. This is the crux of the matter. The Applicant has exhibited the entire case file to try to convince the Court that there is no evidence to sustain the charge. On the foregoing authorities, at this stage, I am estopped from enquiring into the evidence

available against the Applicant. The DPP has exercised his constitutional authority to prosecute the Applicant. That authority cannot be challenged in these proceedings. The Police have been directed to arrest and prosecute the Applicant pursuant to the Legal Advice. They have a statutory duty to comply with the directive of the DPP.The Court cannot stop the Police from carrying out their constitutional and statutory functions.

In the case of: ***A.G. Anambra State vs. Chief Uba & Ors. (2005) All FWLR (Pt.277) 909 at 925-926,*** the Court of Appeal, held that for a person to go to court to be shielded from criminal investigation and prosecution amounts to an interference with the powers given to law officers to control criminal investigations under the Constitution of the Federal Republic of Nigeria.

Sequel to the foregoing, I am of the view that it will be ultra vires the powers of the Court to set aside the Legal Advice of the 3rd Respondent or restrain the 1st and 2nd Respondents from arresting the Applicant based on the Legal Advice of the 3rd Respondent.

Consequently, ***I resolve the sole issue for determination in favour of the Respondents. This application is accordingly dismissed with N10, 000.00 (ten thousand naira) costs in favour of each of the 1st and 2nd Respondents.***

P.A.AKHIHIERO
JUDGE
19/06/17

<u>COUNSEL:</u>

S.K.MOKIDI ESQí í í í í í í í í í í í í í í í APPLICANT

SIMON OZABOR ESQ.í í í í í ..í í í .1ST & 2ND RESPONDENTS