

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  
17<sup>TH</sup> DAY OF JULY, 2017.

SUIT NO: HAG/1M/2017

In the matter of an application by  
MALLAM AUDU USMAN MONEYHAND IKEME  
For an Order of Prohibition

And  
In the matter of an Order of Prohibition  
On Magistrate Grade 1 of  
Magistrate Court Agenebode and the  
Commissioner of Police Edo State  
Command on Charge No. MAG/16<sup>c</sup>/2016:  
Commissioner of Police Vs Mallam Audu  
Usman Moneyhand Ikeme

BETWEEN:  
THE STATE  
And

1. THE MAGISTRATE GRADE 1  
MAGISTRATE COURT AGENEBODE \_\_\_\_\_ RESPONDENT
  2. THE COMMISSIONER OF POLICE  
EDO STATE COMMAND \_\_\_\_\_ RESPONDENT
- MALLAM AUDU USMAN MONEYHAND IKEME \_\_\_\_\_ APPLICANT

RULING

This is a Ruling on a Motion on Notice for Leave to apply and issue the Order of Prohibition on the 1<sup>st</sup> & 2<sup>nd</sup> Respondents. The application is brought pursuant to:

- i. Order 38 of the Edo State High Court (Civil Procedure) Rules 2012;
- ii. Section 6(1), (2), (3); & 6(6) (b) of the CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (as amended);
- iii. SECTION 272 (1) & (2) OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (as amended);
- iv. SECTION 36 (1), (2), (8) & (12) OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (as amended);
- v. SECTION 4 & 23 OF THE POLICE ACT CAP P. 19 LAWS OF THE FEDERATION OF NIGERIA 2004;
- vi. UNDER THE INHERENT JURISDICTION OF THIS COURT; and
- vii. The leave granted by this Court on the 6<sup>th</sup> of March, 2017.

The GROUNDS for seeking the Order of Prohibition is as contained in the STATEMENT MADE PURSUANT TO ORDER 38 RULES 1, 2, 3 & 4 of Edo State High Court Civil Procedure Rules 2009, (GROUNDS ON WHICH THE APPLICATION IS SOUGHT) and the AFFIDAVIT IN SUPPORT OF THE MOTION.

The application is supported by a 44 Paragraphs Affidavit deposed to by the Applicant Mallam Audu Usman Moneyhand Ikeme.

Attached to the Motion Paper and the Affidavit in Support are Four (4) Exhibits:

- Exhibit FG1 – Copy of Charge Sheet in Charge No. MAG/16<sup>c</sup>/2016: Commissioner of Police vs. Mallam Audu Usman Moneyhand Ikeme.
- Exhibit FG2 – Copy of Writ of Summons, Statement of Claim; Claimants Witnesses Written Statements on Oath; List of Witnesses; List of Documents to be relied upon by the Claimant and the Documents to be relied upon attached thereto in Suit HAG/3/2015.
- Exhibit FG3 – Statement of Defence of the 7<sup>th</sup> & 8<sup>th</sup> Defendants in HAG/3/2015.
- Exhibit FG4 – Issues for determination filed and adopted by the Parties in the Suit.

The Motion is also supported by a Written Address of Counsel.

The Respondents were duly served with the Court processes but they did not put up any appearance in Court, neither did they file any response.

The background facts which informed this application are that the Applicant (as Claimant) in Exhibit FG1 instituted an action against the Governor of Edo State; the Edo State Executive Council; the Attorney-General & Commissioner for Justice Edo State; the Commissioner for Local Government & Chieftaincy Affairs Edo State, Etsako East Local Government Council; Etsako East Local Government Traditional Council; Mallam Ali Sulayman and HRH J.B. MOMOH, J.P, the Ogieaga the 3<sup>rd</sup> and Clan Head of Three Ibie Clan as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants respectively on the 28<sup>th</sup> day of July 2015.

The Defendants were duly served with the originating processes in the aforesaid suit. The 1<sup>st</sup> – 4<sup>th</sup> Defendants filed their Statement of Defence; the 7<sup>th</sup> & 8<sup>th</sup> Defendants filed a Joint Statement of Defence while the 4<sup>th</sup> & 5<sup>th</sup> Defendants have not filed any Defence.

It is alleged that the issues which the Court is called upon to pronounce upon in the aforesaid suit are the live issues in the Charges in Exhibit FG1, namely:

***Who is the Village Head of Imiegba; whether the appointment of Mallam Ali Sulayman by fiat is in consonance with the Customary Law of Imiegba; and whether the Chieftaincy declaration upon which Mallam Ali Sulayman was appointed as Village Head of Imiegba Village is in consonance with Imiegba Custom.***

Meanwhile, the said Suit No:HAG/3/2015 is pending before this Court.

Moving the Motion, the learned Counsel for the Applicant, F.G.Oikerhe Esq., relied on his affidavit in support of the motion and adopted his Written Address as his arguments in this application.

In his Written Address, the learned counsel formulated two Issues for Determination as follows:

***ISSUES FOR DETERMINATION:***

- I. Whether from the totality of the Affidavit in Support of the Motion; appraisal and examination of the Statement made pursuant to Order 38 Rules 1, 2, 3 & 4 of the Edo State High Court Civil Procedure Rules 2012, if the Applicant's Reliefs as sought by him in the Motion Paper can be granted; and***
- II. If Charge No. MAG/16<sup>c</sup>/2016 C.O.P vs. Mallam Audu Usman Moneyhand Ikeme does not constitute an abuse of process of Court?***

**ARGUMENTS:**

The learned counsel argued the two Issues together in his Written Address.

Opening his arguments, he submitted that in an application of this nature, the Applicant must establish any of the following factors before the Court can exercise its discretion to grant Leave to issue and serve the Writ of Prohibition on the Respondents:-

- I. Where the lower Court exceeds its jurisdiction;
- II. Wherever anybody of persons having legal authority to determine questions affecting the rights of the subject, and having the duty to act judicially, act in excess of their legal authority;
- III. Where a body and inferior Court having a primary jurisdiction, it takes upon itself the decision of something not included within its Jurisdiction; and
- IV. Where a body or inferior court breaches the rules of fair hearing; natural justice, equity and good conscience.

Learned counsel referred the Court to Exhibits FG1 – FG4. In Exhibit FG2 (at Pages 2 & 3 of Exhibit FG2, under the heading “*Endorsement to be made on the Writ before issue thereof*”, the Applicant (as Claimant in Suit HAG/3/2015), where the Applicant claims against the Defendants jointly and severally, *inter alia*, Declarative Reliefs that Mallam Ali Sulayman is not qualified to be the Village Head of Imiegba, that the Applicant is the Village Head, Odashi II & Oshieshieweh of Imiegba Village having been appointed according to Imiegba Village Native Law and Custom.

Furthermore, the Applicant is seeking to set aside: the Declaration in Edo State Legal Notice (E.S.L.N) 1 of 2015 Gazette; the appointment of Mallam Ali Sulayman as Village Head of Imiegba; a restrictive Order; and an Order compelling and directing the Governor of Edo State, the State Executive Council to limit their choice and appointment of the Village Head of Imiegba to the Applicant who was earlier presented by the Imiegba Village and her kingmakers.

Counsel maintained that Mallam Ali Sulayman who is the 7<sup>th</sup> Defendant in Suit HAG/3/2015 has actual knowledge of the Suit of the Applicant and he filed a Memorandum of Appearance and a Joint Statement of Defence attached as *Exhibit FG3*.

He stated that at the close of pleadings the Applicant formulated Five (5) Issues for the Determination of the Court. The five (5) Issues formulated by the Applicant which were adopted by all Defendants and the Court as contained in Exhibit FG4.

He submitted that the Court is yet to take evidence of witnesses of the Parties and arrive at a decision on the rightful person to be the Village Head of Imiegba Village. He submitted that until the Court decides, the Charges as contained in Exhibit FG1 against the Applicant are spurious, speculative and an attempt to pre-empt the judicial functions and pronouncement of the Court.

He submitted that the Police Act is no authority for the Police to arrest, detain and arraign persons on issues of Chieftaincy and Civil matters and cited the case of: ***IFEANYI ANYANOR VS. COMMISSIONER OF POLICE DELTA STATE & 3 OTHERS (2007) CHR (Cases on Human Rights) Pg 183 @ 185 Ratio 1.***

Furthermore, he contended that the Nigeria Police Force is a creation of Statute (the Police Act Cap P.19 Laws of the Federation of Nigeria 2004) and there is nothing in Sections 4 & 29 of the said Police Act which empowers the Nigeria Police and the 2<sup>nd</sup> Respondent to sit in judgment over a claim or matter before the High Court to know who among two suitors is the Village Head.

According to him, by virtue of Exhibit FG1, the 2<sup>nd</sup> Respondent has taken over the JUDICIAL POWERS of the Federation vested in the Courts provided for in Sections 6 & 272 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). That by virtue of Exhibits FG2 & FG3 there exists a legal right of the Applicant which only the Edo State High Court has Jurisdiction to hear and determine.

Again he submitted that by virtue of Exhibits FG2, FG3 and FG4 the matter or cause of who is the Village Head of Imiegba between the Applicant and Mallam Ali Sulayman is **subjudice** (in the course of trial) and the 2<sup>nd</sup> Respondent laying a Criminal Charge on the Applicant vide Exhibit FG1 offends against the doctrine of *lis pendens*.

Counsel maintained that the doctrine of **lis pendens** finds expression in the assertion that it prevents any transfer of any rights or taking of any steps capable of foisting a state of helplessness and/or hopelessness on the pendency in Court of an action and even after. He said that by that doctrine, the law does not allow a litigant during the currency of the litigation to prejudice any of the litigating parties. He said that the doctrine negates and disallows any transfer of rights or interest in any subject-matter that is being litigated upon during the pendency of litigation in respect of the subject-matter. He quoted the maxim as: “**PENDENTE LITE NIHIL INNOVETUR**” (during litigation nothing new should be introduced) and cited the case of: **RT. HON. ROTIMI CHUBUIKE AMAECHI VS. INDEPENDENT NATIONAL ELECTORAL COMMISSIONER & 2 OTHERS (2008)158 LRCN (Law Reports of Court of Nigeria) Pg 1 @ 46/47 Ratio 64 & @ 240 EE – JJ & @ 241 A – F.**

Counsel submitted that on the authority of: **AMAECHI VS. INEC** (supra), the Court should hold that the doctrine of *lis pendens* applies to the Counts and Charges in Exhibit FG4 as arraigned by the 2<sup>nd</sup> Respondent before the 1<sup>st</sup> Respondent against the Applicant and declare that Exhibit FG1 founded upon an illegal or/and unlawful inquiry of a matter *subjudice* at the High Court Agenebode is null and void. He urged the Court to make an Order of Prohibition against the 1<sup>st</sup> & 2<sup>nd</sup> Respondents prohibiting and forbidding them from going on with the Counts and Charges in Exhibit FG1.

Learned counsel submitted that an Order of Prohibition will issue from the High Court to an inferior Court where: an inferior court lacks Jurisdiction; where an inferior Court departs from the rules of natural Justice; or where the Judex of the inferior court has an interest in the case before him or in any way biased.

He maintained that the Court in deciding whether or not to grant an Order of Prohibition will not be fettered by the fact that an alternative remedy exists. See, the case of: **THE STATE**

***VS. THE CHIEF MAGISTRATE ABOH-MBAISE, Exparte ONUKWE (1978)1 LRN (Law Reports of Nigeria) Pg 316 @ 318 Paras 5.***

He contended that in matters before administrative and judicial (and quasi-judicial) bodies (such as the Nigeria Police), justice should not only be done but should appear to have been done. According to him, the behavior of the 2<sup>nd</sup> Respondent will create an impression in the mind of the Applicant (erroneous though the impression may be) that the 2<sup>nd</sup> Respondent did not hold the scales of justice quite evenly between Mallam Ali Sulayman and himself. He said that when an umpire enters the arena and participates in the conflict, he ceases to be an umpire and becomes a contestant and his vision is bound to be clouded by the dust of the contest.

He submitted that by slamming the Counts and Charges in Exhibit FG1 on the Applicant (when indeed the subject-matter of who is the rightful person to occupy the Village Head of Imiegba Village is *subjudice*), the 2<sup>nd</sup> Respondent has given the impression of partisanship and interest as a prosecutor and he cited the maxim : *nemo potest esse simul actor et judex* (no one can at once be a suitor and a Judge).

Counsel contended that Charge No. MAG/16c/2016: C.O.P Vs. Mallam Audu Usman Moneyhand Ikeme not having been properly or legally initiated before the 1<sup>st</sup> Respondent and that being a condition-precendent to the assumption and exercise of jurisdiction by the Court, the 1<sup>st</sup> Respondent has no Jurisdiction to entertain same.

Furthermore, he submitted that the 2<sup>nd</sup> Respondent who had actual Notice of the pendency of Suit No HAG/3/2015: Chief (Mallam) Audu Usman Moneyhand Ikeme Vs. The Governor of Edo State & 7 Others of which Mallam Ali Sulayman (his Petitioner) is the 7<sup>th</sup> Defendant in connivance with his Petitioner took to self-help and breached the Rule of Law and Self-help.

He submitted that the principle of the Rule of Law as stated by DICEY are:

- a. The absolute supremacy of law as opposed to the exercise of arbitrary power;
- b. Equality of all persons before the law;
- c. That the CONSTITUTION is the result of the Ordinary Law of the Land as interpreted by the Courts. See the case of: ***ELESIE AGBAI & 5 OTHERS VS. SAMUEL I. OKOGBUE (1991)7 NWLR (pt. 204) Pg 391 @ 400 Ratio 18 & @ 431 Paras D – E.***

He maintained that once there is dispute between Parties, it is the Courts that are to adjudicate and self-help is ruled out and cited the case of: ***ELESIE AGBAI & 5 OTHERS VS. SAMUEL I. OKOGBUE (Supra) @ 401 Rationales 19 & 20.***

He submitted that the functions of Courts in any orderly society is to settle disputes between persons, between government or authority and any person in that society and for anyone to resort to self-help, in a situation such as in this case, is the very antithesis of orderliness. See: ***AKPATA, JSC in AGBAI VS. OKOGBUE (Supra) @ 447 Para H & 448 Para A; Governor of Lagos State Vs. Ojukwu (1986)1 NWLR (pt. 18) 621; and ELESIE AGBAI & 5 OTHERS VS. SAMUEL I. OKUGBUE (Supra) @ 402 Ratio 22 & @ 444 Paras F – H.***

Counsel submitted that it is an affront on this Honourable Court for the 2<sup>nd</sup> Respondent to prefer the Charge in Exhibit FG1 against the Applicant and if the Court does not make an Order of Prohibition against the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, the Court will open a flood gate of illegality and self-help whereby a party in a matter pending before a High Court and particularly the High Court Agenebode will during the pendency of the Suit , rush with a Petition to the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent will slam a Criminal Charge on the other Party who is the Claimant, to foist on the Claimant and Court a situation of near helplessness and hopelessness.

He maintained that these presumptions and presuppositions potent danger and he urged the Court to grant the Reliefs.

I have carefully examined the two Issues for Determination formulated by the Applicant and I am of the view that Issue One is sufficient to determine the application.

As earlier observed, the Respondents did not file any process to challenge this application. So on the part of the Respondents, the facts as disclosed by the Applicant 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 Respondents are deemed to have admitted all the facts as contained in the Applicant's affidavit in support of the application.

However, the mere fact that the Respondents are not contesting this application does not mean that the application will automatically succeed. The Court is duty bound to consider the merits of the entire application.

It is settled law that the grant of the order of prohibition is an exercise of the court's discretion. Like every such exercise of discretion; it must be exercised judicially and judiciously. See: *Commissioner for Local Government vs. Ezemuokwe (1991) 3 NWLR (Pt.181) 615 at 631.*

Furthermore, an order of prohibition can be issued against an inferior court or tribunal on any of the following grounds:

- I. Want or absence of jurisdiction;
- II. Excess of jurisdiction;
- III. Breach of the rules of natural justice; and
- IV. Error on the face of the record.

See the cases of: *Onyekwuluje vs. Benue State Government (2005) 8 NWLR (Pt.928) 614; Queen vs. Resident, Ogoja Province, Ex parte Onah (1957) 2 FSC 30.*

The main thrust of this application for prohibition is that the Applicant instituted an action against the Governor of Edo State and seven others in Suit No: HAG/3/2015 to determine as between the 7<sup>th</sup> Defendant in the said suit (Mallam Ali Sulayman) and himself, who is the legitimate Village Head of Imiegba village. While the said suit was pending before this Court, the 2<sup>nd</sup> Respondent arraigned the Applicant before the 1<sup>st</sup> Respondent at the Magistrate Court Agenebode and charged him with counts *inter alia* for parading himself as the Village Head of Imiegba.

The Applicant has seriously contended that, the charge before the Magistrate Court is highly prejudicial to the suit before the High Court and that the lower court lacks the jurisdiction

to try him for the aforesaid offences when the matter of Village Headship is pending at the High Court, Agenebode. He is apprehensive that a conviction at the lower court will render the proceedings at the High Court nugatory.

As earlier stated, the Respondents have accepted all the facts as presented by the Applicant. The matter of Village Head of Imiegba is pending before this Court in Suit No: HAG/3/2015. I do not think the 2<sup>nd</sup> Respondent was right to unilaterally charge the Applicant to the Magistrate Court while the matter is still pending in this Court. Moreover, there is no injunctive order to restrain the Applicant from parading himself as Village Head of Imiegba. The resort to a criminal charge is quite prejudicial to the Applicant who has a pending suit before this Court. It is in the interest of justice and fair play for the parties to await the outcome of the civil suit before any criminal prosecution if necessary.

I agree with the learned counsel for the Applicant that until the civil suit is determined by this Court, the Charges as contained in Exhibit FG1 against the Applicant are, speculative and an attempt to pre-empt and prejudice the judicial functions of this Court.

It is therefore *ultra vires* the powers of the Respondents to continue the prosecution of the Applicant while the civil suit is pending before this Court on the same subject matter. I think it is in the interest of justice to stop the criminal trial at the lower court while the civil suit is on going before this Court.

In the event, I resolve the sole Issue for Determination in favour of the Applicant and the application is granted as follows:

***An Order of Prohibition to issue to the Magistrate Court Agenebode presided over by A.A. Asibor Esq., Magistrate Grade 1 and the Commissioner of Police Edo State Command (1<sup>st</sup> & 2<sup>nd</sup> Respondents) to stop the trial of the Applicant or/and prohibiting them from trying the Applicant at the Magistrate Court Agenebode in Charge No. MAG/16<sup>c</sup>/2016: Commissioner of Police Vs. Mallam Audu Usman Moneyhand Ikeme. I make no order as to costs.***

P.A.AKHIHIERO  
JUDGE  
17/07/17

COUNSEL:

F.G.OIKERHE ESQ.....APPLICANT

UNREPRESENTED.....1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS