IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON TUESDAY THE
27TH DAY OF MARCH, 2018.

SUIT NO: HCU/MISC/1F/2018

IN THE MATTER OF AN APPLICATION BY THE APPLICANT FOR AN ORDER FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS TO PEACEFUL ASSEMBLY AND ASSOCIATION

BETWEEN:

OBIYAN PAUL }…..……..……. APPLICANT

AND

1. ANTHONY ONOHIAGA
2. EWAEFOH ODOGBE } ……..…….. RESPONDENTS
3. IGHODALO OKOH
4. EHINOME OBHIEKHEHA

RULING

This is a Ruling in respect of an application for the enforcement of Fundamental Rights brought pursuant to Order 2, Rules 2, 3 And 4 of the Fundamental Rights (Enforcement Procedure) Rules, 2009; Article 10, 11 And 12 (A) of the African Charter on Human and People's Rights (Ratification And Enforcement) Act; 1983, Sections 40, 41 and 42 of the Constituti on of the Federal Republic of Nigeria, 1999 and under the inherent jurisdiction of the Court.

The Applicant is seeking the following reliefs:

1. AN ORDER of this Honourable Court for the enforcement of the Applicants FUNDAMENTAL RIGHTS under the Constitution of the Federal Republic of Nigeria in terms of the reliefs sought in the statement in support of this Application.

2. INJUNCTION restraining the Respondents by themselves, agents, servants and or privies or such other persons from oppressing the Applicants or imposing any inhibition or restriction on the freedom of Assembly and Association of the Applicant or agents and family of the Applicant in respect of this Suit.

3. A DECLARATION that the acts of the Respondents that culminated in this application are unconstitutional.

4. AN ORDER for General, Aggravated and Exemplary damages in favour of the Applicant for the sum of N150, 000, 000. 00 (one hundred and fifty million naira) only against the Respondents, jointly and severally as reparation for their acts that culminated in this Application.

The Application is supported by an affidavit of 15 paragraphs, a Statement in Support, and a Written Address of counsel.

The Respondents were duly served with all the Court processes and in response; they filed a Joint Counter Affidavit, a Supporting/Verifying Affidavit and a Written Address

The facts of the case, as garnered from the Applicant's affidavit, are that the Applicant and the Respondents are from Idumu-Isi in Onewa Communiy of Uromi, Esan North East Local Government Area of Edo State.

He claims to be the owner of a plot of land measuring 638feet by 407 feet lying, being and situate at Ikeku Ukoghodo in Onewa Community, part of which is the subject matter of Suit No: HCU/32/2017 pending before this Court.

According to him, on the 22nd day of November, 2017, the Court ordered the service of court processes in the said suit on the Defendant, Mr. Abiehode Festus Okosun by pasting. That as soon as the bailiff of Court pasted the processes on the

walls of the house of the said Defendant, the Respondents called a meeting and banished the Applicant from the community.

He alleged that at the meeting, a pronouncement was made that nobody should associate with him and that he should not associate with anybody. That after the pronouncement was made, one Mr. Anthony Ifada visited his house and the said Ifada was summoned to the Community Hall by the elders of Onewa under the influence of the 1st to 4th Respondents, they imposed a fine of N19, 000. 00 (nineteen thousand naira) and a she goat for visiting him. That Ifada pleaded with them and he paid the sum of N15, 000. 00 (fifteen thousand naira), before he was allowed to celebrate his daughter's wedding.

That due to this fact nobody wants to associate with him or even talk to him in the community as they are all scared that they would be sanctioned if they visit him.

That he went to the house warming ceremony of his friend, Benedict Aigboghie but was prevented by the 1st to 4th Respondents from entering the house with a warning that if he entered the compound, they would all leave the venue.

That he was also not allowed to attend the marriage ceremony of the daughters of Sunday Onohiaga and Mr Ihayere Arebamen.

That the people of Onewa were also warned not to attend the wedding ceremony of his son.

That he brought this application because of the unconstitutional breaches of his rights.

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

> ***Whether the act of the Respondents that culminated in this application is constitutional and not actionable?***

Addressing on the sole issue, the learned counsel submitted that freedom of association and assembly are some of the rights guaranteed by Sections 40, 41 and 42 of the Constitution of the Federal Republic of Nigeria, 1999.He contended that everybody is protected by the Constitution especially the provisions of Chapter IV thereof which is enforceable. For this, he relied on **Section 46** (1) which states thus:

> "***Any person who alleges that any of the provisions of this Chapter has been breached is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress***."

He maintained that freedom of association, movement and assembly of a citizen are sacrosanct and as soon as a person's freedom is denied, he ceases from being a man. That freedom is what makes a man a man, and as soon as it is removed from a person, he is automatically dehumanized. That he does not need to be given any bodily harm before he can allege torture and urged the court to hold that the act of the respondents amounts to torture of the applicant. He relied on the case of: ***EKPU VS A. G. FEDERATION. (SUPRA) 399: 8. (421, PARA. A).***

Counsel posited that the trial Court has a duty to ensure respect for and the observance of Human Rights and the Court can only do this by refusing to give interpretations which seek to tamper with the Fundamental Human Rights of individuals but to respect and enforce them. For this view, he relied on the case of: ***NEW PATRIOTIC PARTY VS I G P. ACCRA (2000) 2 HRLRA 1 AT 27: 25. (79, PARAS D- H)***

He contended that the Constitution is an organic document which must be interpreted as speaking from time to time. That it can only describe the Fundamental Rights and Freedom it guarantees in broad terms and it is for the court to fill the Fundamental Rights provisions with contents such as would fulfill their purpose and infuse them with life. He urged the court to do so in this case and cited the case of: ***AGBAKOBA V. DIR. S.S.S. (SUPRA) 266:16 (282, PARAS. E-G)*** in support.

On the issue of damages, he posited that the law presumes that damages flow naturally from injuries in fundamental rights proceedings and cited the case of: ***ABIOLA VS. ABACHA (SUPRA) 454. 9AND 10 (486. PARAS. C-E; 469-470, PARAS G-H).***

He enumerated the factors to be considered in awarding damages for infringement of Fundamental Rights as follows:

1. The frequency of the type of violation in recent times;
2. The continually depreciating value of the Naira;
3. The motivation for the violation;
4. The status of the applicant;
5. The underserved embarrassment meted out to the Applicant including pecuniary losses; and
6. The conduct of the parties generally, particularly that of the Respondents.

In support, he cited the following decisions: **AJAYI VS. A-G FEDERATION (SUPRA) 378:6. (388-389, PARAS H-C); ODOGU VS A-G, FEDERATION(SUPRAPARASEF);**and **DR. GABRIEL OLUSOGA ONAGOR UWA & ANOR VS. IGP & 5 ORS (SUPRA) 613: 54 AT 650-651, PARA F-A.**

Counsel submitted that where a right is shown to have been breached, the Applicant is entitled to compensation and public apology. See: **1. ODOGU VS. A-G. FEDERATION (SUPRA) (102, PARAS D-E);** and **2. FAWEHINMI VS. BABANGIDA (SUPRA) 148:6. (155, PARAS. E).**

He therefore urged the Court to grant the reliefs.

As earlier stated, the Respondents filed a Joint Counter Affidavit, a Supporting/Verifying Affidavit and a Written Address of Counsel.

In their counter affidavit, the Respondents presented their own version of the situation. They admitted that the Applicant and themselves are all from Onewa community in Uromi.They denied paragraphs 4(b), 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Applicant's supporting Affidavit. According to them, this application emanated from a land dispute between the applicant and one Mr. Abiebhode Festus Okosun presently before this Court in Suit No. HCU/32/2017.That the Applicant is the claimant while Mr. Abiebhode Festus Okosun is the Defendant

That the said Defendant summoned the Applicant before their village Elder's Council and the elders in Council after thorough investigation found out that the said land in dispute belongs to the Defendant and they told the Applicant to stop trespassing on the land and vacate same.

That the Applicant took the ruling of the Elders' in Council in bad faith and left the venue infuriated and vowed that he was going to deal with the elders that deliberated on the matter.

That the Applicant then sued Mr.Abiebhode Festus Okosun before this Court and the 2nd Respondent is a witness to the Defendant in the said the suit.

They maintained that since the Elders ruled on the matter, both the Applicant and members of our community have been living together in peace and there was never a time that the Applicant was banished from our community by anyone.
That the Applicant lives with them in their community, associates with them in the Church and in the village market.

That when the Applicant's son wedded, the 4th Respondent, and many other members of their community including one Mr. Friday Eiterebhe and Mr. Gabriel Oriabure attended the wedding. That no member of the community was fined for associating with the Applicant.

That the Applicant was never prevented from attending the house warming ceremonies, marriage ceremonies, burial ceremonies or any ceremonies being organized by members of the community.

That when the alleged Mr. Anthony Ifada gave his daughter out in marriage the Respondents and the Applicant were together and they ate and drank on the same table.

That the Applicant filed this application out of malice and bad faith because the Respondents testified against him before the Elders Council.

The said Mr. Friday Eiterebhe who allegedly attended the wedding of the Applicant's son also deposed to a Supporting/Verifying affidavit to corroborate some of the foregoing facts.

The Respondents exhibited a host of court processes in respect of Suit No.HCU/32/2017 between the Applicant and the said Mr.Abiebhode Festus Okosun, pending before this Court.

In his Written Address, the learned counsel for the Respondents, C.O.Aimionowane Esq. Identified a sole Issue for Determination as follows:

> ***WHETHER THE APPLICANT ESTABLISHED THAT THE RESPONDENTS VIOLATED HIS FUNDAMENTAL RIGHTS TO PEACEFUL ASSEMBLY AND ASSOCIATION AS ENSHRINED IN THE CONSTITUTION?***

Addressing on the issue, learned counsel submitted that the Applicant has not successfully established a case against the Respondents for the breach of the Applicant's Fundamental Rights to Peaceful Assembly and Association.

According to him, before a breach of the Fundamental Right of Freedom of Association and Assembly as enshrined in section 40, 41 and 42 of the constitution of the Federal Republic of Nigeria 1999 can be established, the Applicant must prove an actual breach. He contended that from the Applicant's Affidavit, he merely asserted and failed to prove that he was banished or ostracized from the community.

Counsel emphasised that in enforcing fundamental rights of a citizen the burden of proof rests on the Applicant and referred to the case of: ***FAJEMIROKUN V. COMMERCIAL BANK NIGERIA LIMITED 2009VOLUME 175 LRCN 99 AT 106*** *RATIO 9,* where the Supreme Court held that he who asserts must prove.

Counsel referred the Court to paragraphs 6 – 13 of the Applicant's supporting affidavit where he alleged that some persons where fined because they visited him and he was also barred from attending some ceremonies and pointed out that there are no verifying affidavits by these persons to ascertain the veracity of his assertions.

He submitted that the Applicant has not proved that he was banished or ostracized from Onewa Community but have only made some unfounded spurious assertions. He maintained that Courts are expected to exercise their direction in the appraisal of affidavit evidence in a manner that is judicious and judicial. That in this case, there are no facts upon which this Court can exercise its discretion in favour of the applicant.

He submitted that it is the duty of an Applicant alleging breach of his Fundamental Rights to place sufficient evidence before the Court and it is only thereafter that the burden shifts to the Respondents. He posited that where the evidence is scanty, the Court should strike out the application for being devoid of merit. See the case of: ***FAJEMIROKUN V COMMERCIAL BANK NIGERIA LIMITED Supra***.

Learned counsel submitted that the Applicant was never banished. He referred the Court to paragraph 4 of the Applicant's affidavit where he stated that the Respondents banished him from the community and paragraphs 5-13 where he talked about him being ostracized. He maintained that Banishment means to send one on exile and referred to: ***BLACK'S LAW DICTIONARY EIGHT EDITION BY BRYAN A. GARNER PAGE 154.***

He further submitted that paragraph 4 which talks of banishment, contradicts paragraphs 5-13 where he said he was ostracized. He posited that in the light of the contradiction in the Applicant's affidavit it is clear that the application is spurious.

He submitted that in law, contradiction by a witness affects the veracity of his evidence. He therefore urged the Court to disregard the affidavit of the Applicant. See: ***EYO VS ONUOHA AND ANOTHER (2011) VOL 195 LRCN 38 AT PAGE 44 RATIO 1***.

Learned counsel submitted that the Respondents in their counter affidavit and their verifying affidavit have successfully shown that the Applicant was neither banished nor ostracized from their community as he still lives with them and associates with them.

He further submitted that in Civil matters whoever asserts must prove and that the burden of proof l lies on that person who would fail if no evidence at all were given on either side. For this, he referred to the case of: ***WEST AFRICAN COTT. LTD V HARUNA 2008 13 WRN 130 AT 135 RATIO 5.***

He posited that the Applicant has not proved his case on the depositions in his affidavit and relied on the case of: ***UBN PLC V A.B (W.A.) LTD 2010 Vol. 150 LRCN 1 AT PAGE 5 RATIO 5*** where the Court held that when cases are tried upon affidavit evidence, the facts or deposition in such an affidavit have to be proved.

He urged the Court to dismiss the application.

At the hearing of this Application, the learned counsel for the parties made some additional submissions.

C.O.Aimionowane Esq. for the Respondents adumbrated as follows: He submitted that ***Ostracism*** is defined by ***International Webster's Comprehensive Dictionary 2013*** as: "***Exclusion as from society or common privileges by general consent"*** He said that to ostracize means to shut out or exclude by ostracism.

Next, he submitted that the Applicant by filing further affidavits as Annexures to their reply negates Order 6 Rule 2 of the Fundamental Rights Enforcement Procedure Rules 2009 because they did not obtain the leave of Court to file further affidavits. He said that the affidavits were a ploy to cure a defect in the originating processes.

Finally, he submitted that assuming without conceding that the Applicant was ostracized, he said that the Respondents were justified by ***Section 45 of the 1999 Constitution.***

In his further submissions, B.A. ILuobe Esq. for the Applicant adopted his Written Address on Point of Law dated 29/1/18 and a Further Affidavit of 14 paragraphs. He said that attached to the Further Affidavits are **Exhibits "F1"** and **"F2"** which are the affidavit of persons who were punished for visiting the Applicant in his house after he was ostracized. He said that Order 6 of the FREP Rules does not apply since he did not make any amendments.

Again, he posited that Section 45 of the 1999 Constitution does not apply as it relates to the government and not to local communities. He said that the right under Section 40 of the Constitution to assemble and freely associate with others work both ways. See: ***Emeka V. Okoroafor (2017) 17 WRN p.1 at p.10 ratio 4***.
He referred the Court to examine **Exhibit "F1"** and **"F2"** to see the evidence of ostracism.

In his WRITTEN ADDRESS ON POINTS OF LAW, the learned counsel for the Applicant submitted that the Respondents' counter affidavit went beyond denial of the allegations contained in the supporting affidavit of the Applicant.

On the burden of prove in a fundamental right action counsel submitted that where the Constitution gives a right and facts have been proved which *prima facie* show an infringement, it is for the person alleged to have infringed that right to justify the infringement. See the following cases: ***MARTINS & 2 ORS V. NWACHUKWU & 2 ORS [2008] CHR 82 AT 85 : AGBAKOBA V. SSS [1994] 6 NWLR (PART 351) 475;*** and ***PUNCH NIGERIA LTD. V. AG. FEDERATION AND ORS. [1998] 1 HRLRA*** 488**.**

Furthermore, he submitted that the standard of proof to establish entitlement to relief is by preponderance of evidence. See: ***SUNDAY AWOYERA V. I. G. P. & ANOR [2009-10] CHR 118 AT 128: 5.***

He maintained that the Applicant has established a prima facie case of infringement and the onus is on the Respondents to justify the infringement. He said that the Respondents have not justified the infringement which amounts to an admission of the infringement of the right of the Applicant.

He contended that the affidavits of Mr. John Igberaese and Anthony Ifada have further evidenced the acts of the Respondents.

Learned counsel objected to paragraphs 4, 22 and 23 of the counter affidavit of the Respondents Counter Affidavit on the ground that they offend ***Section 115 {2} of the Evidence Act 2011*** which provides that: ***"An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion***."

He maintained that the contents of the said paragraphs are legal arguments and conclusions and as such the Court cannot rely on them. See the cases of*:* ***NIGERIA LNG LTD VS. AFRICAN DEVELOPMENT INSURANCE CO. LTD (1995) 8, NWLR PT 416, 677 AT 780 -781;*** **GOVERNOR OF LAGOS STATE VS. OJUKWU (1986) 1 NWLR (PT 18) 621**.

He therefore urged the Court to strike out the paragraphs of the counter affidavit of the Respondents.

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 Respondents on the validity of the Written Address on Point of Law and Further Affidavit dated 29/1/18 filed by the Applicant. The learned counsel for the Respondents objected on the ground that it violated Order 6 Rule 2 of the Fundamental Rights Enforcement Procedure Rules 2009 because they did not obtain the leave of Court to file further affidavits.

The said Order 6 Rule 2 provides that ***"The court may, on the hearing of the application allow the statement to be amended and may allow further affidavits to be used if they deal with new matters arising from the counter affidavit of any party to the application."***

I must first observe that Order 6 is on: ***AMENDMENT OF STATEMENTS AND AFFIDAVITS.*** Upon a careful examination of the Written Address on Point of Law and Further Affidavit dated 29/1/18 filed by the Applicant, I discovered that it was not filed pursuant to any application to amend the Applicant's Statements or Affidavit. Rather, it was filed pursuant to the provisions of Order 2 Rule 7 of the FREP Rules which provides that:

> "***The applicant may on being served with the respondent's Written Address, file and serve an address on points of law within 5 days of being served and may accompany it with a further affidavit."***

I agree with the learned counsel for the Applicant that he did not make any amendment to his processes so the said Order 6 is not applicable. Furthermore, on the complaint that the Applicant filed multiple further affidavits without the leave of Court, I am also in agreement with the Applicant's counsel that only one Further Affidavit was filed in line with Order 2 Rule 7 of the rules. The affidavits of Mr. John Igberaese and Anthony Ifada are mere documents exhibited in the Further Affidavit. They were exhibited as Exhibits F and F1 respectively. It is settled law that documents attached to an affidavit are part of the affidavit. See: ***University of Ilorin vs. Oyolana (2001) FWLR (Pt.83) 2193;*** and ***N.E.C vs.Wodi (1989) 2 NWLR (Pt.104) 444.*** The Applicant is entitled to attach relevant documents to support the depositions.

The objection of the Respondents' counsel is erroneous and therefore overruled.

Coming to the merits of the application, I have carefully considered the facts contained in all the processes filed along with all the supporting affidavits, the documents exhibited therein and the submissions of learned counsel for the parties.

By virtue of the provisions of Order 1 Rule 1 of the Fundamental Rights Enforcement Procedure Rules, 2009 and section 46(1) of the 1999 Nigerian Constitution, every victim of human rights violation is empowered to seek redress in a High Court located in any state of the Federation where the right has been, is being or likely to be violated. See the following cases: ***Isuama vs. Governor of Ebonyi State (2007) 20 WKN 170;*** and ***Jack vs. University of Agriculture Markurdi (2004) 5 NWLR (Pt.865) 208.***
In the instant application, the Applicant has alleged that the Respondents have infringed on his rights to peaceful assembly and association, freedom of movement and freedom from discrimination as guaranteed by sections 40, 41 and 42 of the 1999 Nigerian Constitution respectively. The Applicant has adduced copious affidavit evidence to support his allegations against the Respondents.

According to the Applicant, the Respondents acting in concert with other members of the Elders Council in Onewa, Uromi, caused him to be banished and ostracized from the community. He exhibited some depositions of witnesses to corroborate his assertions.

In opposition to the application, the Respondents vehemently denied the allegations and adduced copious affidavit evidence to contradict the Applicant and to try to convince the Court that the Applicant was never banished or ostracized. They gave vivid accounts of how they have been interacting and associating with him in recent social functions.

In view of the foregoing, it is evident that there are material contradictions in the affidavit evidence adduced by the parties. The affidavits and counter affidavits are irreconcilably in conflict.

It is settled law that where the court is faced with irreconcilable affidavits, the court, in order to resolve the conflict properly, should first hear oral evidence from the deponent and his witnesses if any. See the following decisions on the point: ***Falobi vs.Falobi (1976) NMLR 169 at 178;*** and ***Falola vs. UBN (2005) All FWLR (Pt.257) 1435***.

The framers of the Evidence Act of 2011, in an unprecedented legislative effort in Nigeria, enacted the general principle in section 116 of the Act which provides as follows:

"116. When there are before a court affidavits that are irreconcilably in conflicts on crucial facts, the court shall for the purpose of resolving the conflicts arising from the affidavit evidence, ask the parties to proffer oral evidence as to such facts, and shall hear any such oral evidence of the deponents of the affidavits and such other witnesses as may be called by the parties."

Thus framers the Evidence Act of 2011 has validated this long standing practice. Under this procedure, the deponents are subjected to the acid test of cross examination to ascertain their credibility. The Court will have the opportunity to study the demeanour of the witnesses in order to assess their credibility.

The court has held that the address of counsel cannot take the place of oral evidence to ascertain the credibility of the deponents. See: ***Ebohon vs. Attorney General of Edo State (1997) 5 SCNJ 163***.

From the foregoing, I am of the view that the facts in conflict are very material to the just determination of this application. In the face of such irreconcilable conflicts it will be impossible to give a just verdict at this stage. In order to determine the veracity of the deponents it will be expedient to allow the parties to call oral evidence before arriving at a decision.

Consequently, it is ordered that the Applicant and the Respondents shall adduce further oral evidence to resolve the conflicts.

I make no order as to costs.

P.A.AKHIHIERO
JUDGE
27/03/18

COUNSEL:

B.A.Iluobe Esq.……..Counsel for the Applicant

C.O.Aimionowane Esq.……Counsel for the Respondents.