

**JUDGE
FEDERAL HIGH COURT
LOKOJA**

**IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LOKOJA JUDICIAL DIVISION
HOLDEN AT LOKOJA**

**ON TUESDAY, THE 28TH DAY OF JUNE, 2016
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE PHOEBE M. AYUA
JUDGE**

SUIT NO: FHC/LKJ/CS/69/2015

BETWEEN:

MR. MIKE EKOMA.....APPLICANT/RESPONDENT

AND

- 1. THE COMMANDANT GENERAL, NIGERIA
SECURITY AND CIVIL DEFENCE CORPS
ABUJA.**
- 2. THE COMMANDANT, NIGERIA
SECURITY AND CIVIL DEFENCE
CORPS, LOKOJA.**

...RESPONDENTS/APPLICANTS

RULING

This Ruling relates to the Motion on Notice brought by the Applicant, pursuant to section 44(1) and (2) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) (the 1999 Constitution and Order 26 Rules 2(1) and 3 of the Federal High Court (Civil Procedure) Rules, 2009. The application prays the Court for the release of the trailer tanker of the Applicant, with Registration No. XV211 AAA, which was impounded by the 2nd Respondent in May, 2014 to the Applicant as the innocent rightful owner and payment of damages to the said Applicant by the Respondents in the sum of N10million.

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The Puling also relates to the Notice of Preliminary Objection filed by the Respondents/Applicants to challenge the competence of the Applicant's main Motion for being incompetent and therefore robbing this Court of the jurisdiction to entertain it. On the 10/05/2016, the Applicant was granted leave by this Court to move their Motion.

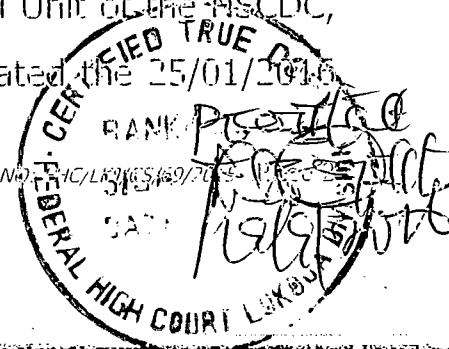
The learned Counsel for the Applicant, A. P. Udoma, Esq., holding the brief of the substantive Counsel, A. I. Norman, Esq., moved the application and submitted that the Motion on Notice was dated the 16/12/2015 and filed on the 31/12/15.

He also submitted that the Motion was brought pursuant to section 44(1) and (2) of the 1999 Constitution, Order 26 Rules 2(1) and 3 of the Federal High Court (Civil Procedure) Rules, 2009 and the inherent jurisdiction of this Court as preserved by section 6(6) of the 1999 Constitution.

The learned Counsel referred to the two prayers in the Motion paper and submitted that they were withdrawing prayer two.

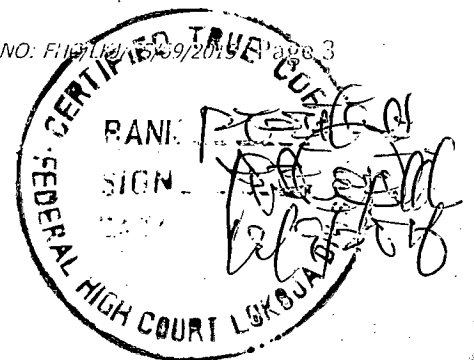
He urged this Court to strike out prayer two. Learned Counsel submitted that they were relying on the 24-paragraph affidavit and the documents annexed thereto in this application. He then adopted their written address filed in support of the application and urged this Court to grant their prayer 1.

On their part, learned Counsel for the Respondents, E. S. Onu, Esq., submitted that in opposition to that application, the Respondents filed a Counter affidavit of 25 paragraphs, deposed to by Anawo Audu, of the Legal Unit of the NSCDC, Lokoja, Kogi State Command. The Counter Affidavit was dated the 25/01/2016.



and filed on the same date. He submitted that they were placing reliance on all the paragraphs of that Counter affidavit to oppose this application. Learned Counsel also adopted their written address as their argument in opposition to the Counter Affidavit and urged this Court to refuse the application. Learned Counsel also drew the Court's attention to the further and Better Affidavit filed and served by the Applicant on the Respondents as a response to the Counter Affidavit and that the 1st and 2nd Respondents filed a further counter affidavit of 16 paragraphs in response. Learned Counsel, thereafter moved the 1st and 2nd Respondents' Motion on Notice which raised a Preliminary Objection to the competence of the Applicant's/Respondent's main application. Learned Counsel submitted that the Preliminary Objection via Motion on Notice, dated the 22/01/2016 and filed on the 25/01/2016, was brought pursuant to Order 29 Rule 19(a) and (b) of the Federal High Court (Civil Procedure) Rules, 2009 and under the inherent jurisdiction of this Court. He further submitted that the Preliminary Objection asks for three (3) reliefs as stated in the Motion paper. That they also filed a 7-paragraph affidavit in support of the Preliminary Objection. He said they were relying on all the paragraphs of the said affidavit and he then adopted the written address also filed in support of the Preliminary Objection and urged the Court to accept it as their submission in their application. Finally, learned Counsel urged this Court to decline jurisdiction.

In response to the Respondents' Preliminary Objection, learned Counsel for the Applicant/Respondent submitted that they had filed a Reply on points of law to oppose the Preliminary Objection. That the Reply on Points of law is dated the 18/03/16 and that it was filed on the same date. Learned Counsel submitted that their arguments in opposition to the Preliminary Objection are contained in



the Reply on points of law together with the legal authorities cited therein. He adopted the submission in the Reply on Points of law and urged this Court to uphold their submissions. He also acknowledged the further and better affidavit which he said the Applicant filed in response to the Respondent's Counter affidavit against the Applicants main application. He submitted that they were relying on all the paragraphs of the Further and Better affidavit as well as the documents annexed thereto to urge the Court to, on grounds of equity and disregarding technically, grant their prayer.

Learned Counsel for the Respondents further submitted that what the Applicant was entitled to file after having received the Preliminary Objection was a counter affidavit to the Preliminary Objection but that rather the Applicant filed a document titled:

REPLY TO THE PRELIMINARY OBJECTION OF THE RESPONDENTS/ APPLICANTS DATED 25TH JANUARY, 2016.

Learned Counsel submitted that they received the said Reply to the Preliminary Objection and in reaction, the Respondents filed a Reply on points of law dated the 24/03/16 and filed on the 30/03/2016. That in the said Respondents'/Applicants' Reply on point of law, the Applicant's/Respondent's Reply was challenged for having been filed out of time without the leave of Court, etc. That after the Respondents'/Applicants' Reply on Point of Law, the Applicant/Respondent was estopped from filing further processes but that the Applicant/Respondent file further processes.

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At this juncture, the Applicant's/Respondent's Counsel was quick to point out that he did not adopt all the other processes filed by them and that the said processes have been abandoned by the Applicant/Respondent.

Well, the Motion on Notice filed by the Respondents/Applicants on the 25/01/2016 raised a Preliminary Objection challenging the competence of the Applicant's/Respondent's Motion herein. The Preliminary Objection will be considered and determined first as the issue touches, ultimately, on the competence or otherwise of this Court to entertain the Applicant's/Respondent's main Motion for release of his impounded vehicle.

ARGUMENT IN SUPPORT OF THE PRELIMINARY OBJECTION FILED BY WAY OF MOTION BY THE RESPONDENTS/APPLICANTS

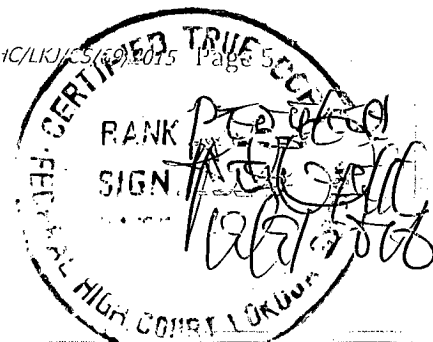
In the Motion, a Preliminary Objection was raised to the competence of this suit. The sole ground of objection was stated thus:

This suit is not competent to invoke the jurisdiction of the Honourable Court. Particulars of the ground are stated as follows:

- a. The 1st and 2nd Respondents/Applicants are entitled to a pre-action notice as a mandatory condition precedent to the suit.*
- b. The suit is not commenced through a due process of law.*

The reliefs sought are stated to be:

- 1. A declaration that the 1st and 2nd Respondents/Applicants are entitled to pre-action notice as a condition precedent to the suit.*
- 2. A declaration that the suit is not commenced through due process of law;*
and



3. An Order of this Honourable Court striking out the suit for want of jurisdiction.

In the affidavit in support of the Motion it is averred, inter alia, that the 1st and 2nd Respondents/Applicants did not receive pre-action notice from the Applicants before the commencement of this action.

In the written address of Counsel for the Respondents/Applicants, "Brief facts" of the suit are given as follows:

My Lord, on the 19th day of May, 2014, a truck with Registration Number Lagos W 211 444, loaded with 33,000 litres of crude oil was apprehended by officers and men of the Nigeria Security and Civil Defence Corps, Kogi State Command, Lokoja.

The said truck carrying 33000 litres of crude oil was apprehended along with one Olajide Olatunji (motor boy). While he (Olajide) and the driver of the truck attempted to escape from arrest. Olajide was knocked down by an oncoming motorcycle and he was arrested, but the driver of the truck escaped arrest. Olajide (the only suspect arrested then) made useful information while under investigation before he was arraigned at the Federal High Court, Lokoja vide a Charge No: FHC/LKJ/48C/14. Unfortunately, midway into trial, Olajide (the Accused) escaped from lawful custody which eventually stalled his criminal trial. However the said Olajide (Accused), the driver of the truck who escaped arrest, the owner of the said truck, and some other persons who were found culpable through thorough investigation have been on the wanted list of the 1st and 2nd Respondents/Applicants.

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Surprisingly, sometime in January 2016, the Applicant, Respondent brought an application before this Honourable Court claiming ownership of the said truck conveying 33000 litres of crude oil at the same time claiming ignorance of the crude oil carried by his truck. While he also claimed damages for the apprehension of the said truck. The said application which was filed vide of Motion paper was done without any form of pre-action notice served on the 1st and 2nd Respondents/Applicants, hence the notice of Preliminary Objection.

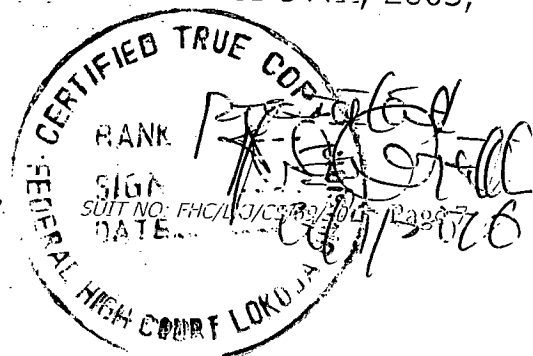
Learned counsel for the Respondents/Applicants then raised two issues for the determination of the Court as follows:

- a. Whether the 1st and 2nd Respondents/Applicants are entitled to pre action notice before commencement of this action.
- b. Whether or not the case is properly commenced by a due process of the law.

ISSUE ONE

On issue 1, it was submitted that the 1st and 2nd Respondents/Applicants belong to a Federal Government Agency which was established by the Nigeria Security and Civil Defence Corps Act, CAP. N146, Vol. 12, LFN, 2004 (the NSCDC Act, 2003). Learned Counsel also submitted that by the Act, it is mandatory for a pre-action notice to be served on the 1st and 2nd Respondents/Applicants before the commencement of this suit. That by section 20(3) of the NSCDC Act, 2003, it is provided that:

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No suit shall be commenced against a member or the Board or the Commandant General or any other officer or employee of the Corps before the expiration of a period of one month after a written notice of intention to commence the suit shall have been served on the Corps by the intending Plaintiff or his agent.

It was the submission of learned Counsel that it is clear from provision of section 20(3) of the NSCDC Act, 2003 that pre-action notice is mandatory condition which the 1st and 2nd Respondents/Applicants are entitled to prior to the commencement of any action against them. That in the present case, the Applicant/Respondent did not comply with this mandatory condition before he commenced this action thereby divesting this Court of the jurisdictional competence to effectively determine the case.

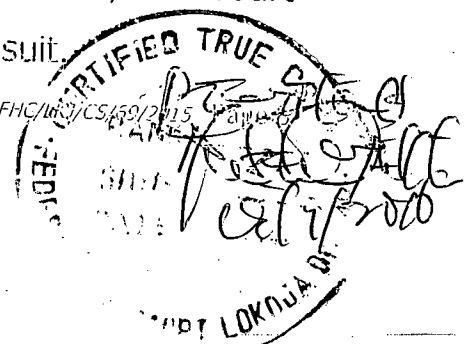
He relied on the case of **FAYEMI V. L.G.S. C., OYO STATE (2005) ALL FWLR (PT. 254)** page 901 CA, where the Court of Appeal held that:

Pre-action notice is foundational and want of it is fatally injurious as it will not admit of any remedy whatsoever. Once a pre-action notice is not given where it is necessary, the action becomes incurably defective for want of jurisdiction.

Learned Counsel submitted that based on section 20(3) of the NSCDC Act, 2003 and the case of **FAYEMI V. L.G.S. C., OYO STATE (supra)** the Respondents/Applicants are entitled to pre-action notice as foundational to the jurisdiction of this Court and that since the Applicant/Respondent has failed to comply with the condition precedent to serve a pre-action notice on the 1st and 2nd Respondents/Applicants before the commencement of this case, the Court lacks the jurisdiction to entertain the Applicant's/Respondent's suit.

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ISSUE TWO

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On issue two, it was the argument of learned Counsel that the Applicant/Respondent did not commence this action by the mode of commencement of an action given the nature of his case. He referred to Order 3 Rules 1 and 2 of the Federal High Court (Civil Procedure) Rules, 2009.

Learned Counsel submitted that the Motion of the Applicant/Respondent before this Court contains reliefs and claim for damages as it relates to property, particularly prayers 1 and 2 of the Motion on Notice. That since prayers 1 and 2 of the Applicant's/Respondent's Motion contains reliefs and claim for damages, it is mandatory as provided in Order 3 Rules 1 and 2 of the Federal High Court (Civil Procedure) Rules, 2009, that such suit be commenced by way of writ of summons.

It was further submitted by learned Counsel that the class of cases that are supposed to be commenced by way of originating application are cases in respect of prerogative orders such as habeas corpus, mandamus, prohibiting certiorari and fundamental rights enforcement. That cases connected with elections are to be commenced by way of petition. That the present application does not fit in as a Fundamental Human Rights enforcement case or proceeding as it does not in any way comply with the Fundamental Human Rights Enforcement Procedure) Rules, 2009.

That the Motion does not also fit in as a Motion demanding for any of the prerogative orders of the Court. That rather the Motion contains reliefs and claim for damages in civil-action which the Rules of this Court makes it mandatory to be commenced by way of writ of summons.

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Furthermore, learned Counsel submitted that the order of the Rules of this Court under which the Applicant/Respondent brought his action makes his case incurably bad in that order 26 Rules 2 (1) and 3 of the Federal High Court (Civil Procedure) Rules, 2009 only regulate interlocutory applications. That the Motion before this Court does not however, qualify as an interlocutory application as there is no pending case before this Court on the same subject matter before the application was brought.

Learned Counsel said he was relying on their above submissions to urge this Court to hold that the case before this Court is not properly commenced by due process of the law.

In conclusion, learned Counsel argued that from their submissions above, it is clear that the Applicant/Respondent did not serve a pre-action notice on the Respondents/Applicants before the commencement of this action. That it is also clear that the suit was not brought to the Court by due process of law. That this Court therefore lacks the jurisdiction to entertain this case.

Learned Counsel stated the determinants of the jurisdiction of a Court as follows:

The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Learned Counsel emphasized the importance of jurisdiction to a Court in its adjudicatory functions and again relied on the case of **FAYEMI V. L.G.S. C., OYO STATE (supra)** at Ratio 2, 5 and 6.

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It was the submission of Counsel also that when words used in statutes are clear the Court is bound to give the word their ordinary meaning without resort to any external or internal aid. He relied on the case of **EBGELE V. POSTMASTER GENERAL (2011) ALL FWLR (Pt.576) 575 Ratio 5.**

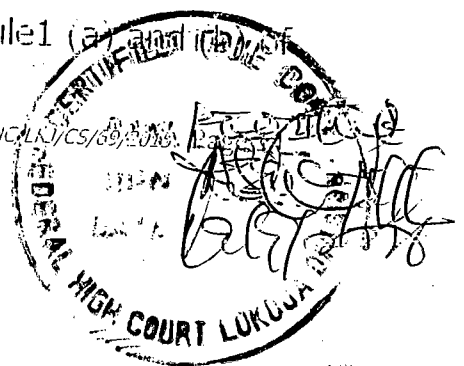
Learned Counsel argued that from the legal and judicial authorities cited above, it is clear that this Court lacks the jurisdiction to entertain the case of the Applicant/Respondent in that he never served a pre-action notice on the Respondents/Applicants before he commenced this action as required by the NSCDC act, 2003, and that the suit was not commenced by due process of law. The learned Counsel urged this Court to decline jurisdiction and strike out this suit as it is the law that any action taken on the case without jurisdiction will amount to a nullity no matter the diligence or dexterity or brilliance displayed in the conduct of the matter.

He relied on the case of **AGUNDI V. COP. (2013) ALL FWLR (PT.660) 1247 C.A. Ratio 2 at P.1276.**

Finally, he urged the Court to decline jurisdiction to strike out this suit for want of jurisdiction.

APPLICANT'S/RESPONDENT'S REPLY TO THE PRELIMINARY OBJECTION OF THE RESPONDENTS/APPLICANTS

The Applicant's/Respondent's Reply to the Respondents'/Applicants' Preliminary Objection was filed on the 18/03/16. Learned Counsel for the Applicant/Respondent in the said reply argued that the Respondents/Applicants brought their motion for Preliminary Objection pursuant to Order 29 Rule 1 (a)



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the Federal High Court (Civil Procedure) Rules, 2009 which relates particularly to originating summons and not interlocutory application.

Learned Counsel also submitted that Order 26 Rules 1 and 2 and Rule 7(2) of the Federal High Court (Civil Procedure) Rules, 2009, empower this Court to invoke its jurisdiction to entertain the Motion of the Applicant/Respondent dated the 31/12/15 in the interest of justice.

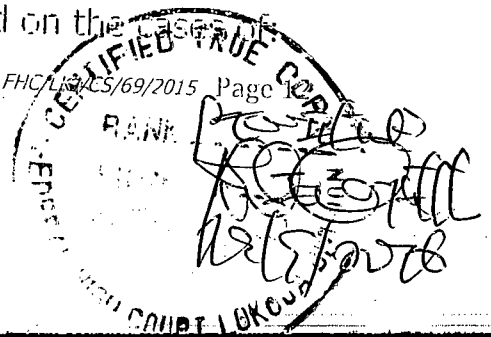
It was also the submission of Counsel that the Order and or relief sought by the Applicant/Respondent is for release of his truck that was unlawfully detained in absence of any order of a Court of competent jurisdiction. That the Applicant did exhibit a notice in writing in the affidavit in support of the Motion to the 2nd Respondent/Applicant who is a subordinate to the 1st Respondent/Applicant and that by such notice, they became aware of the Motion filed by the Applicant/Respondent to entitle the Applicant to be heard by this Court for the reliefs sought.

The learned Counsel further submitted that this Court can, via its inherent jurisdiction and discretionary, powers invoke its jurisdiction to hear the Applicant's/Respondent's Motion. He relied on the case of **BAMAIYI V. THE STATE (2001) 4 SC. (Pt.11) 18** and urged the Court to exercise its discretion judiciously and judicially in allowing their application.

Furthermore, learned Counsel submitted that the grounds on which the Respondents/Applicants based their argument to urge this Court to strike out the suit and foreclose the Applicants/Respondents from being heard are founded on mere technicality which no Court of justice and equity will permit to override substance and merit of the case before it. He cited and relied on the case of:

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- *ALIU BELLO v. A.G. OYO STATE (1986) S.C. I AND III.*
- *BRITISH AMERICAN INSURANCE COMPANY LTD. V. EDEMA – SILLO (1993) 2 NWLR (PT.277) 567 AT 579.*

Learned Counsel urged this Court to, on the basis of the judicial authorities cited above, to discountenance the Preliminary Objection as the same is based on mere technicality and as such lacks substance to shut the Applicant/Respondent from being heard on the merit.

This Court was further referred to sections 9(1) and (2) and 10(1) and (2) of the Federal High Court Act. Learned Counsel relied particularly on section 10 to urge the Court to stand on the principles of equity and justice and invoke its powers to entertain the application of the Applicant/Respondent on equitable grounds. He relied on the case of *NIG. LABORATORIES CORP V. PME LTD. (2013) 3 WRN per Mohammed, JSC.*

In conclusion, learned Counsel implored this Court to consider his submission above and to hold that the Preliminary Objection of the Respondents/Applicants is premature and if upheld by this Court would inflict a great and irreparable damage to the Applicant/Respondent. That by the Court invoking its jurisdiction to hear both parties it will help the Court to determine the merit of this matter. Finally, he urged this Court to refuse the Preliminary Objection and set down the Applicant's/Respondent's Motion for hearing.



1ST AND 2ND RESPONDENTS'/APPLICANTS' RESPONSE TO
PRELIMINARY OBJECTION.

The learned Counsel for the Respondents/Applicants filed a Reply on point of law to the Applicant's/Respondent's response to the Preliminary Objection. In the said reply on points of law, learned Counsel raised an issue that the Applicant's/Respondent's Reply to the Preliminary Objection is not competent as it was filed out of time without the leave of Court. That by Order 26 Rule 5 of the Federal High Court (Civil Procedure) Rules, 2009, the Applicant/Respondent had only seven (7) days from the service of the Respondents'/Applicants' Motion on Notice containing the Preliminary Objection. That the Preliminary Objection which is an interlocutory application was served on the Applicant/Respondent on the 29/02/2016. That the Applicant/Respondent filed his Reply to the Preliminary Objection on the 18/03/16 without the leave of this Court and without payment of default fee by the Applicant/Respondent. That the Practice Direction of the Honourable Chief Judge of this Court imposed default fee of one thousand Naira only (N1,000.00) on defaulting party for each day of default. That the period between 29/2/16 wherein the Preliminary Objection was served on the Applicant/Respondent and the 18/03/2016 when the Applicant's/Respondent's Reply to the Preliminary Objection was filed is far above the seven (7) days mandatorily allowed by the Rules. That the Preliminary Objection having been filed out of time without the leave of this Court renders it incompetent. That this implies that the Applicant/Respondent has no reply to the Preliminary Objection as the same was filed out of time without the leave of the Court.

Learned Counsel argued that the submission of the Applicant's/Respondent's Counsel that Order 29 Rule 1 (a) and (b) under which the

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Learned Counsel argued that the submission of the Applicant's/Respondent's Counsel that Order 29 Rule 1 (a) and (b) under which the Respondents/Applicants brought their Preliminary Objection is only related to originating summons and not interlocutory application is misconceived. That Order 29 Rule 1(a) and (b) of the Federal High Court (Civil Procedure) Rules, 2009 concerns itself with a party who disputes the Court's jurisdiction generally and that it does not indicate exclusiveness to originating summons anywhere. Learned Counsel maintained that Order 29 Rule 1(a) and (b) of the Rules of this Court is not particular to originating summons but also concerns itself with a party that disputes the Court's jurisdiction generally. This Court was urged to so hold.

Furthermore, it was submitted that the Applicant/Respondent also misdirected himself when he relied on Order 26 Rule 7(2) of the Federal High Court (Civil Procedure) Rules, 2009 to challenge the position of the Respondents/Applicants that the application of the Applicant/Respondent is neither a fundamental rights proceeding nor an interlocutory application since there is no substantive case before this Court. That Order 26 Rule 7(2) is not applicable in this regard and cannot save the incompetence of the Applicant's/Respondent's case as Order 26 Rule 7(2) relates to Ex Parte Order targeted at preventing delays in exceptional cases wherein Motion on Notice may cause some irreparable damage. That the Applicant's/Respondent's application is alien to our jurisprudence and does not have any foundation.

Learned Counsel reiterated his position that the 1st and 2nd Respondents are entitled to pre-action notice which, in this present case, the Applicant/Respondent failed to serve on them before commencing this action. That what the Applicant/Respondent referred to as notice as mentioned in the Affidavit in

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support of their Motion, Exhibit DL, is not a pre-action notice as it does not indicate anything about any impending Court action. That Exhibit DL is a mere correspondence with the 2nd Respondent/Applicant herein. That assuming without conceding that Exhibit DL was a pre-action notice, it was served on the 2nd Respondent/Applicant only whereas the 1st Respondent/Applicant also needed to be served with a pre-action notice in his own right being a distinct party in this suit.

In addition, learned Counsel submitted that the Respondents'/Applicants' Preliminary Objection is not a mere technicality but fundamental to the just determination of the case as Rules of Court are meant to be obeyed and that justice entails that things are done according to law. He relied on the case of ***APE V. OLOMO (2013) ALL FWLR (PT.668) 895 Ratio 5, 6 and 7.*** Learned Counsel copied out the Ratios of the said case, and urged the Court to discountenance the Applicant's Reply on point of law and to strike out the application before this Honourable Court as the Court lacks the jurisdiction to entertain it.

RESOLUTION OF THE ISSUES

At the hearing of the substantive application filed by the Applicant/Respondent, as well as the Preliminary Objection of the Respondents/Applicants, the learned Counsel for the Applicant/Respondent applied to withdraw prayer 2 of their Motion paper and urged the Court to grant their oral application and to strike out the said prayer 2. The learned Counsel for the Respondents/Applicants objected to the withdrawal and striking out of the prayer two of the Motion paper on the ground that it was too late in the day for that application, as the

Respondents/Applicants had joined issues with the Applicant/Respondent on the said prayer II.

Well, I must say that I have perused the processes of the Respondents/Applicants filed in respect of this suit and it is correct that the Respondents/Applicants have formulated issues in the written address of Counsel in support of the Preliminary Objection containing arguments touching on prayer 2 of the Motion paper. That, however, is not enough reason to preclude the Applicant/Respondent to apply to withdraw prayer 2 of his Motion paper if he is no longer interested in relying on it in his application.

Accordingly I make an order granting the application of the Applicant/Respondent to withdraw the prayer two of his Motion paper. The said prayer 2 is hereby struck out. Now there remains only prayer one in the Motion paper of the Applicant.

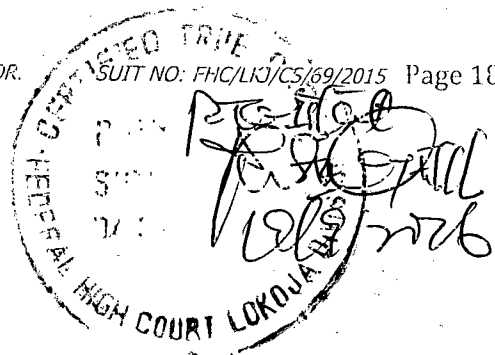
The Applicant moved his Motion and adopted his Written Address in support. The Respondents also adopted their written address which was filed in support of the Counter Affidavit to the Motion of the Applicant. The Respondents/Applicants Preliminary Objection was also moved and the same was responded to by the Applicant/Respondent. The Preliminary Objection challenges the jurisdiction of this Court to entertain the Applicant's/Respondent's Motion on Notice as the same is incompetent. The grounds of the Preliminary Objection are that the Applicant/Respondent did not serve pre-action Notice on the Respondents/Applicants as required by law, precisely, section 20(3) of the NSCDC Act, 2003 and that the Motion was not brought by due process of law.

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The Reply of the Applicant/Respondent to the Preliminary Objection was filed out of time and without the leave of the Court and without paying the default fee for late filing. But I have seen in the case file of this case before this Court, Motion on Notice filed on the 03/05/2016 seeking the leave of the Court to file the Reply to the Preliminary Objection and other accompanying processes out of time and also for an order deeming the said processes already filed and served as having been properly filed and served, appropriate default fee having been paid.

The application, though filed and default fee of over N9,000.00 having been paid as shown on the face of the Motion paper, was not moved. There is however, evidence of filing an application before this Court, filed with a view to seeking the leave of Court permitting the Applicant/Respondent to file their Reply to the Preliminary Objection and other accompanying processes out of time. There is also evidence of default fees. That the application was not moved and granted before Preliminary Objection was moved is not the correct procedure but then should the Applicant/Respondent be punished for the mistake of the Counsel? I think not. I therefore, recognize the Reply to the Preliminary Objection filed by the Applicant/Respondent on the 03/05/2016 as his Reply in opposition to the Preliminary Objection and I so hold. This Court will rely on it as well. It is already in the file. See the case of **FUMODOH V. ABORO (1991) 9 NWLR (PT.214) Ratio 19 at page 229** paragraphs E where it was held by the C. A. that:

The law is trite that a Court can *Suo Motu* make reference to the case file before it and make use of any document it finds necessary.



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See also the case of **BADEJO V. FED MIN. OF EDUCATION (1996) 8 NWLR (PT.446) 50 Ratio 10** where the Court held that a Court can take judicial notice of documents in its record to determine a matter before it.

Then two issues formulated by the Respondents/Applicants in the written address in support of the Preliminary Objection are apt and shall be taken by this Court to be the issues for determination.

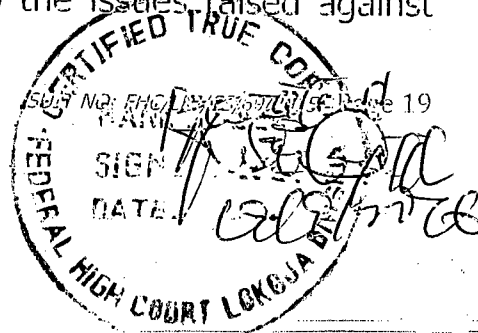
First, let me determine the Preliminary issue raised by learned Counsel for the Applicant/Respondent as regards the Respondents'/Applicants' Preliminary Objection having been predicated on Order 29 Rules 1(a) and (b) of the Federal High Court (Civil Procedure) Rules, 2009.

He argued that Order 29 Rule 1 (a) and (b) relates particularly to originating summons and not to interlocutory applications such as the Respondents'/Applicants' application.

To my mind, the learned Counsel for the Respondents/Applicants in his Reply on point of law adequately answered that query. That the provisions of Order 29 Rule 1 (a) and (b) do not concern, particularly originating summons, but rather are directed at parties seeking to challenge the Court's jurisdiction to entertain a claim. That Order 29 only provides a procedure to be followed in bringing such a Preliminary Objection which the Respondents herein have followed and I agree with him. The Preliminary Objection of the Respondents/Applicants was properly brought under Order 29 Rule 1(a) and (b) and I so hold.

In the Reply to the Preliminary Objection I observe that learned Counsel for the Applicant/Respondent did not adequately respond to the issues raised against

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the competence of the Motion on Notice, and was more concerned with appealing with the Court to disregard the Preliminary Objection and hear the Applicant's/Respondent's Motion on the merit on grounds of equity and justice.

On issue 1, the Applicant/Respondent, for example, sought to rely on Exhibit DL annexed to their affidavit in support of the Motion on Notice and referred to it as a pre-action notice to the 2nd Respondent who is subordinate to the 1st Respondent and so the 1st and 2nd Respondents via that Exhibit DL became aware of the Applicant's Motion. I have read Exhibit DL, and agree with learned Counsel for the Respondents/Applicants that there is nowhere in the said Exhibit DL, a letter written by the Applicant's/Respondent's Counsel, where there is mention of the Applicant's/Respondent's intention to bring an action against the Defendant for failure to release his impounded vehicle.

I therefore, find that the Applicant/Respondent did not give a pre-action notice to the Respondents/Applicants as required by section 20(3) of the NSCDC Act, and I so hold.

The pre-action notice is a condition precedent to the institution of a suit against the 1st and 2nd Respondents/Applicants and in the present case no such preaction notice was served on the Respondents/Applicants which implies that a condition precedent was not met before the Applicant/Respondent instituted the action against them. The suit is thereby made incompetent and this divests the Court of the jurisdiction to entertain it. That failure to serve pre-action notice on the Respondents/Applicants is fatal to the case of the Applicant/Respondent and I so hold. See the case of **MADUKOLU V. NKEMDILIM (1962) 2 SCNLR, 341** and the case of **FAYEMI V. L.G.C.S. OYO STATE (supra)**.

Issue two, is whether or not this case was properly commenced through a due process of law. It was argued that the Applicant/Respondent filed this suit by way of Motion on Notice when it is not an application for prerogative Orders or Fundamental Rights proceedings or an interlocutory application. That the mode of commencement of the Applicant's/Respondent's suit ought to have been by way of Motion on Notice. Learned Counsel for the Respondents/Applicants relied on Order 3 Rules 1 and 2 of the Rules of this Court. The Applicant's/Respondent's Counsel did not adequately counter the submission of the Respondents'/Applicants' submission on issue two and in their Reply to the Preliminary Objection stated that the Applicants/Respondents failed to show how their Motion was brought by complying with Order 3 Rules 1 and 2 of the Federal High Court (Civil Procedure) Rules, 2009, or some other law or Rules of Court. If by relying on S. 41 of the 1999 Constitution the Applicant/Respondent may have had the wish to, in commencing this suit against the Respondents/Applicants, proceed under the Fundamental Rights (Enforcement Procedure) Rules, 2009, the Applicant/Respondent did not follow the procedure laid down in Order II Rules 2 and 3 of the Fundamental Right (Enforcement Procedure) Rules, 2009. It cannot be said, therefore, that the Applicant's Motion on Notice is for the enforcement of his Fundamental Right to property. If it were a Fundamental Rights application, perhaps there would be no need to serve a preaction notice on the Respondents because of the urgency usually attached to Fundamental Rights cases. The Relief sought by the Applicant/Respondent is for an Order releasing his truck which was impounded by the Respondents/Applicants over 18 months ago without Order of a competent Court. By Order 3 Rule 2(a) (i) of the Rules of this Court, the

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Applicant/Respondent who is seeking a relief or remedy for a civil wrong ought to have commenced this action by writ of summons. See Order 3 Rule 2(a)(i) of the Federal High Court (Civil Procedure) Rules, 2009. Having failed to bring this action by way of writ of summons, the Applicant/Respondent has failed to commence this suit against the Respondents/Applicants by due process of law. This makes the suit incompetent and thereby robs this Court of the jurisdiction to hear and determine the Applicant's/Respondent's suit.

I also agree with learned Counsel for the Respondents/Applicants that the Applicant/Respondent brought his application before this Court under a wrong Order, being Order 26 Rules 2(1) and (2) of the Rules of this Court which only regulates interlocutory application and his application not being an interlocutory application it, therefore, fails. I therefore, find that the Applicant's/Respondent's Motion on Notice was not properly commenced before this Court through due process of law and I so hold.

Issue two is also resolved in favour of the Respondents/Applicants.

Issue one and two have been resolved in favour of the Respondents/Applicants. In essence, the Preliminary Objection of the Respondents/Applicants succeeds based on the grounds that no pre-action notice was served on the Respondents/Applicants as mandatorily required by Section 20(3) of the NSCDC Act, and that the action was not initiated by due process of law as the wrong mode of commencement of an action, to wit: Motion on Notice was adopted in bringing this suit before this Court instead of the correct mode of bringing the action which is by writ of summons. See Order 3 Rule 2 (a)(i) of the Federal

High Court (Civil Procedure) Rules, 2009. This Court is therefore, divested to jurisdiction to entertain the Applicant's/Respondent's Motion and I so hold.

Accordingly, although the Motion on Notice of the Applicant was duly moved and opposed by the Respondents/Applicants before this Court, now, having held that this Court lacks the jurisdiction to entertain the Applicant's/Respondent's Motion, I will not take any step towards considering and determining the Motion on Notice of the Applicant/Respondent, as that would be an exercise in futility. See the case of **APE V. OLOMO (supra) Ratios 5, 6 and 7**; where it was held, inter alia in Ratio 6 and 7 that:

The commencement of a suit is very fundamental to the determination of the issue of jurisdiction. An action wrongly commenced is incompetent and this will rob the Court of the jurisdiction to hear and determine same...

Rules of Court are to be obeyed and complied with, where breached or not complied with, without any explanation, as in the instant case, it cannot be over looked or swept under the carpet in favour of the party in breach...

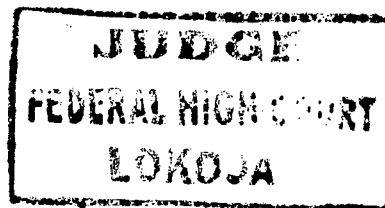
On the whole, I hold that the Preliminary Objection succeeds. I hereby grant all the 3 reliefs sought by the Respondents/Applicants before this Court in this case, as follows:

1. A declaration is made that the 1st and 2nd Respondents/Applicants are entitled to a pre-action Notice as a condition precedent to the suit.

2. A declaration is made that this suit was not commenced through due process of the law, and

3. An Order of this Honourable Court striking out the suit, for want of jurisdiction.

This shall be the Ruling of this Court in this case.



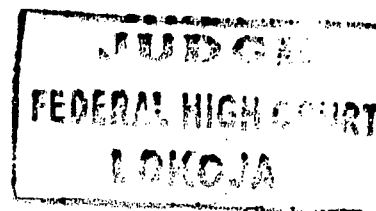
Hon. Justice Phoebe M. Ayua

Judge

Tuesday the, 28th day of June, 2016

Parties: Are all absent from the Court.

Appearances: C. O. Ademola, Mrs, holding the brief of I. O. Norman, Esq., for the Applicant and E. S. Onu, Esq., for the Respondents.



Hon. Justice Phoebe M. Ayua

Judge

Tuesday the, 28th day of June, 2016

