IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABAKALIKI JUDICIAL DIVISION
HOLDEN AT ABAKALIKI

ON WEDNESDAY THE 18TH DAY OF JANUARY, 2017
BEFORE HIS LORDSHIP HON. JUSTICE AKINTAYO ALUKO
JUDGE

SUIT NO: FHC/AI/CS/40/2015

BETWEEN:

ENGR. GABRIEL EVO UGWU ..... PLAINTIFF

AND

1. MR. SUNDAY OKO MBE
2. VICTOR OTU (IPO Zone 6, Calabar, Cross River state)
3. KINGSLEY UGWUANYI (IPO Area Command, Abakaliki, Ebonyi State
4. GREGORY ENWEREOGU (Crime Officer, Afikpo North Police Division)
5. SUNDAY USANG (DPO, AFIKPO NORTH POLICE DIVISION)
6. ASSISTANT INSPECTOR GENERAL OF POLICE (Zone 6, Calabar, Cross River State

} DEFENDANTS

APPEARANCES:

(1) P.O. Egwu Esq for the plaintiff.

(2) Evo Akaa Esq for the 1st Defendant.

(3) H.N. Ikeoha Esq for the 2nd – 6th Defendants

RULING

The plaintiff by his writ of summons and statement of claim dated 27th March 2015 commenced this suit on the 27th day of March 2015 for the enforcement of his fundamental human rights. In the writ of summons and statement of claim, the plaintiff claims as follows:

a. *A declaration that the arrest and detention of the plaintiff in a grimy, air tight, and tiny cell without food or water for over 24 hours in police division Afikpo, Ebonyi State on 30/10/2014 and 09/01/2015 are unlawful, illegal and a gross violation of the plaintiff's fundamental human rights to liberty, dignity to human person, etc. as guaranteed under section 35 and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Article 6 of the African Charter on Human and peoples' rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation of Nigeria, 2004.*

b. *A declaration that the continued threat of or actual intimidation, harassment, molestation and arrest of the plaintiff by the defendants are unjustified and illegal as same violates the plaintiff's fundamental human rights to liberty, dignity to human person. Etc. as guaranteed under section 35 and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 6 of the African Charter on Human and peoples' rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation of Nigeria, 2004.*

c. *An order of Court awarding damages to the plaintiff against the defendants jointly and severally in the sum of N1m (One Million Naira) being special and general damages for the violation of his fundamental human rights.*

d. *An order of Court directing the defendants to tender an unreserved apology to the plaintiff by publishing same in the Sun Newspaper and any other Newspaper circulating around Ebonyi State.*

e. *An order of perpetual injunction restraining the defendants, whether by themselves, agents, privies, servants, etc, from harassing, molesting, intimidating, arresting, detaining or however disturbing the fundamental human rights of the plaintiff in relation to these same allegations.*

AND such further or other orders as this Honourable court may deem fit to make in the circumstance of this case.

The 2nd – 6th Defendants filed their statement of defence and memorandum of appearance with Motion on Notice for extension of time to regularize their processes on the 2nd day of December 2015.

Whilst the above were pending, this court on the 10th day of May 2016 directed parties to address it on the competence of this suit going by the mode of commencement of the suit by the plaintiff.

After several adjournments when this suit was adjourned at the instance of the parties for them to address the court on the competence of the suit, the plaintiff finally filed his written address on the 17th day of October 2016, while the 1st Defendant filed his written address on the 8th day of December 2016.

Parties however through their Counsel indicated their readiness to adopt their written submissions on the competence of this suit on the 8th day of December 2016 and consequently, this court granted them leave to do so.

Parties duly adopted their written addresses in this suit on the 8th day of December 2016. Counsel to the 2nd – 6th Defendants though did not file an address on the issue, he nevertheless aligned himself with the submission of the 1st Defendant's Counsel on the point.

From the written addresses of parties and as subscribed by the plaintiff, the issue for determination in this case is:

> *"whether the plaintiff can commence his action for the enforcement of his fundamental human rights by writ of summons in view of the provisions of the Fundamental rights (Enforcement Procedure) Rules 2009".*

The summary of the submissions of the plaintiff is that he can well commence this suit for the enforcement of his fundamental rights by means of writ of summons and that having commenced this suit for the enforcement of his fundamental human rights by means of writ of summons. this suit is competent. Counsel to the plaintiff relied heavily on the provision of Order II Rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009 and

Judicial pronouncement in certain cases. The plaintiff's counsel cited and relied on the following cases (1) AGF vs. Abule (2005) 11 NWLR (pt 936) p. 369 at p. 390/(2004) LPELR – 7330 (CA); (2) Director, SSS vs. Agbakoba (1999) 3 NWLR (pt 595) 425/(1999) LPELR – 954 (SC) pp. 24 – 26, paragraphs A-G, A-G, and A-F respectively to drive home his point.

Since the plaintiff and his Counsel have dwelled heavily on the above cited judicial authorities in their argument, it then become necessary and expedient to revisit them.

In the case of Director of S.S.S & Anor vs. Agbakoba (supra), the applicant, a legal practitioner, a senior advocate of Nigeria and at the time President of a non-governmental human rights body based in Nigeria called the Civil Liberty Organisation (CLO) was invited by the Netherlands Organization for International Development and Cooperation (NOVIB), Hague. He was stopped by the officers of SSS from boarding plane and his passport was seized and impounded. The learned Senior Advocate decided to commence a suit for the enforcement of his fundamental human rights by filing a Motion on Notice before a High Court in Lagos. It must be noted that he did not initiate the suit by writ of summons but by Motion on Notice. The SSS did not file a counter affidavit against his Motion on Notice. The learned trial court refused the declaratory reliefs of the applicant at the trial level on the ground that where declaratory reliefs are involved, it is inappropriate to come by way of Motion on

Notice since declaratory reliefs cannot be made on pleadings, the trial court relied on the case of Wallersteiner vs. Moir (1974) 3 ALL ER 271 where Buckley LJ had said;

> *" it is long been my experience and I believe it to be a practice of long standing that the Court does not make declarations of rights either on admission or in default of pleadings... but only if the court is satisfied by evidence".*

The trial court also hinged its Judgment on the decision in Faponle vs. Unilorin Teaching Hospital Board Management (1991) 4 NWLR (pt 183) 43 at 45 where it was held that; *"A declaratory Judgment being at the discretion of the court to grant, can only be given where the justice of the case warrants it having regard to the pleadings and evidence led in proof under section 136 of the Evidence act. A declaratory Judgment cannot therefore be granted on admission by pleadings".*

The trial court held that the Respondent at the trial court fail to depose to any counter affidavit, therefore, there is no pleading before the court for the defence. The trial court held that the applicant's declaratory reliefs could not be granted because he sought declaratory Judgment in default of Respondent's pleadings.

What was in contention at the apex court was whether the Court of Appeal was right in overturning the decision of the trial court by granting

declaratory reliefs sought by the applicant (now respondent on appeal) in default of the pleadings of SSS, who did not file any counter affidavit to the application of the applicant at the trial court. In overturning the Judgment of the trial court, the Court of Appeal per Ayoola JCA held that the principle in Wallersteiner vs. Moir does not apply in the case of Director of SSS vs. Agbakoba, he held that Enforcement of Fundamental Rights Proceedings has special Procedure established by law as presented by the Fundamental rights (Enforcement Procedure) Rules. He said special procedure in fundamental right proceedings cannot be equated with the normal procedure in actions tried on the pleadings and to which rules of pleadings apply. He held that the principle in Wallersteiner vs. Moir does not apply in the case of Director of SSS vs. Agbakoba because it is not a case in which the court has been asked to make a declaration on admission or default of pleadings or without evidence.

At the Supreme Court, the Solicitor General of the Federation, tried to argue to the contrary with regards to the decision of Court of Appeal per Ayoola JCA by contending that declaratory Judgments are not granted as of right but subject to certain conditions and restrictions and that nowhere under the principles laid down was a distinction made between a declaration sought under the Fundamental Rights (Enforcement Procedure) Rules and the one sought under a writ of summons. He submitted that the principle in Waller Steiner's case applied to admissions whether made under pleadings or in the enforcement

of a fundamental right action and that when the appellant (SSS) failed to file a counter affidavit against the Motion on Notice, the appellants were deemed to have admitted all the facts deposed to in the affidavit, thereby making Waller Steiner's case applicable.

The Supreme Court while endorsing the position of the Court of Appeal as against those of the trial court and the Solicitor General of the Federation. and while considering the provision of order 2 rule 1(1) of the Fundamental Rights (Enforcement Procedure) Rules 1979, held as follows:

> *"From these, it is obvious that there cannot be any pleading where a Motion on Notice is brought because the deposition in the affidavit in support of the Motion on Notice is not the same as mere averments in a statement of claim or a statement of defence which have to be supported with either a viva-voce evidence or documentary evidence.*
>
> *In the case of an affidavit accompanying the application, it is in fact the evidence in support of the Motion on Notice.*
>
> *Similarly, an originating summons is not the same as writ of summons. In the case of the former no pleadings are employed while in the case of the latter there are pleadings in the form of statement of claim, statement of defence, reply etc".*

The Supreme Court went on that:

> *"with the vital distinction between an originating summons and a writ of summons, it was wrong of the learned trial Judge to bring to bear on this*

case, the principle laid down by the cases of Wallersteiner's (supra) and Ozowala (supra)".

The Supreme Court finally held in the case of Director. SSS vs. Agbakoba (supra) that the application of the principle in Wallersteiner's case is limited to cases initiated by a writ of summons which call for pleadings and calling of witnesses to testify or admission by way of averments in the pleadings. It must be said that throughout the length and breadth of the Judgment in Director SSS vs. Agbakoba, the Courts did not endorse the use of writ of summons for initiating suits for the enforcement of fundamental rights. Rather the Court of Appeal and Supreme Court clearly distinguished Fundamental Rights Enforcement Proceedings from actions to be commenced by writ of summons where pleadings like statement of claim, statement of defence and reply are required and necessary and when the principles in Waller Steiner's case becomes applicable.

With respect to the case of AGF vs. Abule (supra) which the plaintiff's Counsel place heavy reliance on and quoted on the surface out of the real context, I have gone through the said case and I am of the considered view that same is not a good authority on the point that writ of summons can be used to commence fundamental right proceedings or suits.

As would be seen, even in Abule's case, the Applicant did not commence his action for the enforcement of his fundamental rights by writ of summons.

The Respondent who was Applicant at the trial Lagos State High Court was tried and convicted by Kano zone of the failed Banks Tribunal of the offence of alleged failure to declare his interests in the loans granted by one Crystal Bank of Africa Ltd to Companies in which he was Chairman or Director and for failure to seek Central Bank of Nigeria's approval whilst a director of the Crystal Bank of Africa Ltd contrary to section 18(3) of the Banks and other financial Institutions Decree No 25 of 1991 and punishable under section 18(9) of the said Decree. The appeal of the Respondent to the Special Appeal Tribunal sitting in Lagos against his conviction was dismissed. The Respondent thereafter applied to the High court of Lagos State for the enforcement of his fundamental human rights which was granted by the High Court.

The Attorney General of the Federation appealed to the Court of Appeal and at the court of Appeal contended that the combined effect of the provisions of Sections 1(5), 24(3) of Decree No 18 of 1994 forbid an inquiry into the decision of the failed bank tribunal by way of judicial review. Counsel to the Respondent argued that the proceedings at the lower court were instituted to enforce the fundamental rights of the respondent to which the ouster clause in Section 1(5) of Decree No. 18 of 1994 would not apply. It is of note that the Respondent at the trial court amongst others had asked for declaratory reliefs and order of certiorari in the suit for the enforcement of his fundamental rights.

When the matter got to the Court of Appeal, the case of Director, SSS vs. Agbakoba was referred to where the Supreme Court held that declaratory and other reliefs can be sought and obtained to enforce and protect fundamental rights by filing an action in a High Court. It was the Counsel to the Respondent amongst others who made submissions to the effect that the manner in which the court is approached for the enforcement of a fundamental right does not matter and that once it is clear that the originating process seeks redress for the infringement of the right so guaranteed under the Constitution and that the court process could be by the Fundamental Rights (enforcement Procedure) rules or by originating summons or indeed by writ of summons.

While the Court of Appeal per Onoghen JCA (as he then was) said it agreed with the submission of the Respondent's Counsel, the court did not decide on whether or not writ of summons can be used to commence fundamental rights suits when there is a special procedure and mode of commencing same which takes its source and root from the Constitution. The Court of Appeal only made reference to writ of summons in passing. What was clearly decided in AGF vs. Abule by the Court of Appeal is that even though one can enforce fundamental rights by way of declarations but not by way of certiorari and that relief four of the Respondent being for order of certiorari is caught by the provision of section 1(5) of Decree No. 18 of 1994 and that the trial court lack jurisdiction to grant an order of certiorari in an application for

enforcement of fundamental rights while the court sustained the remaining reliefs which the Court of Appeal said are permitted under fundamental rights suits.

In the Supreme Court decision in Director, SSS vs. Agbakoba cited and relied upon in AGF vs. Abule, the Supreme Court did not decide or hold that writ of summons can be used to initiate or commence fundamental rights suits or actions. What the Supreme Court decided in Director SSS vs. Agbakoba is that the principle of law which stipulate that declaratory relief cannot be granted on admission or in default of pleadings as held in Wallersteiner vs Moir can only apply in cases or actions commenced by writ of summons where statement of claim, statement of defence and reply are filed and not applicable in case of Fundamental rights (enforcement Procedure) rules which are special procedure established by law as presented by the Fundamental Rights (Enforcement Procedure) Rules.

Even in the case of AGF vs. Abule relied upon by the Plaintiff, the Court of Appeal per Salami JCA at page 22 paragraphs A – B held that

> *" it is trite by a long line of cases which require no citing of authorities that if the law prescribes the manner proceedings are to be commenced or initiated it is by that procedure only could the relief be sought".*

Coming to the provisions of order II rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009 which clearly provides the manner and mode of commencing fundamental right suits and which must be complied with; same does not include writ of summons as one of such modes or manner fundamental rights actions can be initiated.

Order II Rule 2 above provides:

> *"An application for the enforcement of the fundamental rights may be made by any originating process accepted by the court which shall subject to the provisions of these Rules, lie without leave of court".*

The word *"application"* as used in order II rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009 cannot be interpreted or construed to include writ of summons. Under the provision of order I of the Fundamental Rights (Enforcement Procedure) Rules 2009 which is the application and interpretation provision, "application" was defined to mean *"an application brought pursuant to these Rules by or on behalf of any person to enforce or secure the enforcement of his fundamental rights"* while *"applicant"* was defined to mean *" a party who files an application or on whose behalf an application is filed under these Rules" and "Respondent"* was defined to mean *"a party against whom a human rights case has been instituted under these Rules . Lastly, "Rules" was defined to mean "Fundamental Rights (Enforcement Procedure) Rules and any amendments to them".*

A community reading of the above provisions defining the above mentioned relevant words show that "*an application*" and "*any originating process accepted by the court subject to the provisions of these Rules*" referred to under order II rule 2 of Fundamental Rights (Enforcement Procedure) Rules. 2009 cannot be interpreted to include writ of summons. There is nowhere under the Fundamental Rights (Enforcement Procedure) Rules 2009 writ of summons is conceived or contemplated.

One is not unmindful of the provisions of order XV rule 4 of the Fundamental Rights (Enforcement Procedure) Rules which provides that the Civil Procedure Rules of the court for the time being in force should be resorted to in instances not covered by Fundamental Rights Enforcement Rules. The Plaintiff cannot hide under the provision of order XV rule 4 to resort to use of writ of summons because the Fundamental right Enforcement rules has made adequate provisions on mode and manner of commencing or initiating fundamental rights actions.

A Law or Rule cannot be read to contain provisions which tend to defeat or destroy the purpose and aims for which it is set to achieve. Using the provisions of orders II rule 2 and XV rule of Fundamental Rights Rules to import writ of summons as one of the modes of commencing fundamental rights suits is tantamount to defeating or destroy the essence, purpose, aims and the objectives of the Rules which is pursuit of a speedy and efficient enforcement

and realization of human rights. See paragraph 3(f) of the preamble to the Rules. The Fundamental Rights (Enforcement Procedure) Rules is a set of special procedure specifically provided for the enforcement of fundamental rights which unequivocally makes provisions for modes of commencing fundamental rights cases.

The Rule is unique and special rules of procedure which takes its root from the provision of section 46(3) of the constitution of the Federal Republic of Nigeria.

The law with respect to interpretation of any law, legislation or document is that same must be read holistically not in fragments so as to garner the intention of the author or maker see FRN vs Darive (2011) LPELR – 4151 (CA). This is the common and cardinal principle of interpretation

The Supreme Court per Muhammad JSC in Nigerian Army vs. Ammu-Kano (2010) 5 NWLR (Pt. 1188) 429 at 457 had opined as follows:

> *"... Although exhibit P45 is not an Act of parliament or a piece of any legislation, it is a document written with a particular purpose. In order to read the mind of the maker or author of that document, it is necessary to subject such document to an appropriate rule of interpretation that a passage is first interpreted by reference to what follows it. This makes it*

mandatory for one to read the whole passage or document and every part of it should be taken into account"

Applying the above canon of interpretation as endorsed in the judicial authorities above cited will mean that in order to know or discern the intent of the provision of order II rule 2 of the Fundamental rights (Enforcement Procedure) Rules 2009, with respect to mode of commencing Fundamental Rights Suits or actions the whole provisions of the Rules must be read holistically, not in fragments and reference must be made to other relevant provisions of the Rules.

Coming from the above premise and a glance at the relevant provisions of the Rules, leave no one in doubt that facts and allegations bordering on breach of fundamental rights are to be proved by affidavit evidence and not otherwise. See the provisions of orders II rules 3, 4, 6 and 7, order IV rule 4(a); order VI rules 2 and 5; order VIII rule 2 and appendix A(2)(3) of the Rules.

On the contrary, facts and averments in action commenced by writ of summons are proved by witness statement on oath and oral examination of witnesses and tendering of documents at the trial as provided under the provision of order 20 rules 1, 3 and 4 of the Civil Procedure Rules of this court. Affidavit evidence is adopted and used in fundamental right cases to achieve speedy and efficient enforcement and realization of human rights as against actions commenced by writ of summons and statement of claim where witness

depositions do not become evidence until after same has been adopted by the witness who will then be subjected to cross examination for his evidence to be complete and given probative value.

Furthermore, a comparison of the two procedures will show that writ of summons is not contemplated as a mode of commencing fundamental rights actions.

Order IV rule 1 of the Fundamental rights (enforcement Procedure) rules provides that application for the enforcement fundamental rights shall be fixed for hearing within 7 days of filing. Order II rule 6 provides that respondent has 5 days within which to file his written address and counter affidavit while rule 7 of the same order provides that an Applicant shall file his address on point of law and further affidavit within 5 days.

Conversely as would be seen from the writ of summons of the Plaintiff. Defendants were given 30 days within which to file their appearance, statement of claim is filed thereafter to be followed by the filing of statement of defence much later. The Plaintiff will then file his reply to the Defendant's statement of defence within 14 days of service of the statement of defence. It goes on and on like that until pleadings are completed before fixing dates for hearing. All the above enumerated chains of procedure associated with actions commenced by writ of summons are not contemplated under the Fundamental Rights

(Enforcement Procedure) Rules whose aims and objectives among others is speedy and efficient disposal of fundamental rights suits.

To buttress the point that the use of writ of summons is an aberration and not an application recommended and recognized under the Fundamental Rights rules, the Supreme Court in the case of Unilorin vs. Oluwadare (2006) LPELR – 3417 (SC); (2006) 14 NWLR (pt 1000) 751, held that

> " *right to studenship not being among the rights guaranteed by 1999 constitution, the only appropriate method by which the Respondent could have challenged his expulsion was for him to have commenced the action with a writ of summons under the applicable rules of court*".

Furthermore, one of such non-compliance with the provisions of the Fundamental Rights (Enforcement Procedure) Rules which the Rules frowns at and treated as fundamental irregularity and incurable defect is one which relate to mode of commencement of fundamental right actions. See the provision of order IX rule 1 of the Rules.

On a more serious note, the importance of adherence to the provisions of Fundamental rights (Enforcement Procedure) Rules, 2009 has been held to be sacrosanct which must be followed to the letter.

On whether an action founded on Fundamental Rights (Enforcement Procedure) Rules is subject to the other rules of court, the Court of Appeal in the case of Enukeme vs. Mazi (2014) LPELR- 23540 (CA) held as follows:

"I must start by stating the obvious, that Fundamental rights enforcement procedure is sui generis, being specially and specifically designed with its own unique rules by the Constitution to address issues of fundamental rights of persons protected under the Constitution.

Of course, consideration of issues founded on breaches of fundamental rights in this case must be handled within the exclusive confines of the Fundamental Rights (enforcement Procedure) rules of 2009 which actually came to correct some perceived wrongs and hardship which the 1979 rules (fashioned after the 1979 Constitution) caused to Applicants seeking enforcement of their fundamemel rights especially in the areas of adherence to undue technicalities and delays in determining applications"

In Skye Bank vs. Njoku & Ors (2016) LPELR-40447 (CA) at page 19 paragraphs A – B. the Court of Appeal held as follows:

"We have stated several times that an action founded on Fundamental Rights (Enforcement Procedure) rules is sui generis and is not subject to the other rules of court except expressly adopted to fill a lacuna in the

Fundamental Rights (Enforcement Procedure) Rules 2009 by the Chief Justice of Nigeria"

There is nowhere in the rules where the use of writ of summons was expressly or impliedly adopted and there is no lacuna created in the Rules with respect to mode of commencing Fundamental Right actions which the use of writ of summons tend to fill.

Flowing from the above therefore, it is clear beyond all doubts that the use and adoption of writ of summons by the plaintiff as a means of enforcing his fundamental rights in this case is an aberration, misadventure and grossly inappropriate thereby constituting an abuse of the process of this court.

The employment or use of judicial process is regarded generally as an abuse when a party improperly uses judicial process to the irritation and annoyance of his opponent and the effective administration of justice see Ojo & Ors vs. AG. OYO State & Ors (2008) LPELR – 2379 (SC); (2008) 15 NWLR (Pt. 1110) 577; First Bank of Nig. Plc vs. T.S.A Industries Ltd (2012) LPELR – 9714 (SC).

The law is settled and it is that a court is only competent to exercise jurisdiction in respect of any matter where the following coexist:

(1) It is properly constituted as regards numbers and qualification of its members and no member is disqualified for one reason or the other.

(2) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents it from exercising its jurisdiction.

(3) And the case comes by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction see Nwankwo & Ors vs. Yar'Adua & Ors (2010) LPELR – 2109 (SC); (2010) 12 NWLR (Pt. 1209) 518 (SC); Madukolu vs. Nkemdilim (1962) 2 SCNLR 341.

I therefore agree with the submission of the Counsel to Defendants that the present suit as instituted by the plaintiff constitute an abuse of court process. The sole issue formulated by the plaintiff is resolved against him.

I hold that this suit as commenced by the plaintiff is incompetent and same is accordingly struck out.

There shall be no order as to costs, parties should bear their respective costs.

HON. JUSTICE AKINTAYO ALUKO
PRESIDING JUDGE
18 – 01 – 2016

ENDORSEMENT

CASE ARGUED BY:

(1) P.O. Egwu Esq. for the Plaintiff.
(2) Evo Akaa Esq. for the 1st Defendant.
(3) H.N. Ikeoha Esq. for the 2nd – 6th Defendants.