

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

ON WEDNESDAY THE 3RD DAY OF MAY, 2017
BEFORE HIS LORDSHIP
HONOURABLE JUSTICE M. SHITU ABUBAKAR

SUIT NO. FHC/ABJ/CS/568/2016

BETWEEN

NASIRU IBRAHIM DARAZO-----APPLICANT

AND

- 1. BAUCHI STATE GOVERNMENT
- 2. BAUCHI STATE PILGRIMS
WELFARE BOARD

}-----RESPONDENTS

JUDGEMENT

This is an application for enforcement of Fundamental right filed by the applicant. The application was filed at Abuja Division on the 3rd day of August, 2016 during the Annual Vacation of the court. When the case first came up for hearing at Abuja on 16th August, 2016 both parties and their counsel were not in court. Consequently, the presiding Judge, Abang J. made an order

forwarding the case file to the Hon. Chief Judge for normal assignment on the ground that there was no urgency in the matter to warrant him being a vacation Judge to hear it. Thus the matter was finally transferred to this Division for hearing and determination to conclusion because the cause of action arose in Bauchi State.

The application was filed alongside a statement of fact wherein the applicant's reliefs and the grounds upon which they are sought are given as follows:

RELIEFS OF THE APPLICATION

1. A Declaration that the decision taken by the 1st and 2nd Respondents disallowing the Applicant from paying the balance of monies for his Muslim Hajj Pilgrimage amounts to denial and violation of the Applicant's fundamental rights to freedom of thoughts, conscience and religion.
2. A Declaration that the basis for the of decision taken by the 1st and 2nd Respondents in disallowing the Applicant to perform the 2016 Muslim Hajj Pilgrimage is a violation of

the Applicant fundamental right to freedom from discrimination against his political opinion.

3. A Declaration that the applicant is entitled, pursuant to section 42 of the 1999 constitution of the Federal Republic of Nigeria, (as amended) to be treated equally with members of other political party in the exercise of his religious rights.
4. A Declaration that the 1st and 2nd Respondents are under constitutional duty to allow the Applicant to perform his religious worship of Hajj Pilgrimage.
5. An Order of this Honourable Court directing the 1st and 2nd Applicants to issue to the Applicant all documents requisite and indispensable for actual performance of 2016 Muslim Hajj Pilgrimage in the same way and manner other intending pilgrims are given forthwith.
6. An Order of perpetual injunction restraining the 1st and 2nd Respondents for their agents, cohorts, privies or any person deriving authority from them from returning to the Applicant anything whatsoever related to the process,

application for and performance of his 2016 Muslim Hajj Pilgrimage.

7. An order directing the 1st and 2nd Respondents to allow, without any hindrance, the applicant to exercise his fundamental right to perform his religious worship of Hajj Pilgrimage in the kingdom of Saudi Arabia through the authority, guide, protection, supervision and care of the 2nd Respondent.
8. ONE HUNDRED AND FIFTY MILLION NAIRA (150,000,000.00) General and exemplary damage against the Respondents.

GROUND UPON WHICH THE RELIEFS ARE SOUGHT

1. By the provision of Section 42(1) (a) and (b) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) every citizen of Nigeria is entitled to enjoy fundamental rights against discrimination by reason of his political opinion inclination or membership of a political group, association or party. Government, individual or group

of individuals are under a mandatory constitutional duty not to accord any privilege or advantage that is not according to Nigerian citizens of other political opinion.

2. By the provisions of section 38(1) of the constitution of the Federal Republic of Nigeria, 1999 (as amended) the applicant is entitled to be allowed to perform all forms of his religious worship at any place in and or outside Nigeria. The applicant is vested with a fundamental right to manifest his belief in worship, practice and observance of any component of that belief or religion.
3. Pursuant to section 41 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) the Applicant is entitled to move freely and shall not be refused exist from Nigeria.

The application was also supported by a 35 paragraphed affidavit sworn to by the applicant himself. Eight Exhibits namely, Exh. A-H. were also attached to the affidavit. Learned counsel for the applicant, Mukhtar Abubakr Usman Esq. also filed a written

submission and presented legal argument in favour of the applicant.

Upon the service of the processes, the 1st and 2nd respondents filed a counter affidavit to which 3 exhibits namely, Exh. A, B, & C were attached. Learned counsel for the respondents, Haruna D. Mohammed, the solicitor General of Bauchi State, also filed a written submission in their support. Also in furtherance of their defence, the respondents filed a Notice of Preliminary objection in which they prayed the court to dismiss or strike out the case of applicant. Learned Counsel for the respondents, who prepared the preliminary objection A. S. Gumba Esq Chief State Counsel, also filed a written address in support of the preliminary objection.

In response to the respondents counter affidavit and written address, learned counsel for the applicant filed further and better affidavit and reply address on 1st day of November, 2016. Finally learned counsel for the applicant M.J. Jaldi Esq. filed another address in response to the respondents preliminary objection and urged the court to dismiss it.

The foregoing mentioned processes were the ones filed by the parties. At hearing on 26th January, 2017, learned counsel for the applicant who argued the matter, M.J. Jaldi Esq. and learned counsel for the respondents, Haurana D. Mohammed Esq. adopted their process and both urged the court to find for their respective clients.

I have earlier stated elsewhere in this Judgment, that the respondents are challenging the jurisdiction of this court to hear this case. It therefore behoves on me to sort out that issue first before I proceed to determine the case. This is in line with the decision of the supreme court in plethora of cases that once a jurisdictional issue is raised it should be resolved at the earliest opportunity because any decision reached without jurisdiction is a nullity no matter how well it was conducted.

See

1. DIAMOND BANK LTD VS UGUCHUKWU (2016) ALL FWLR PT. 845) 49. S.C.
2. AGBASO VS IWUNZE (2015)11 NWLR (PT. 1471)527 at 536-7 S.C.

3. NWONKWO VS YAR'ADUA (2010)12 NWLR (PT. 1209) 5.18 S.C.

For the above reason therefore, I will start with the issue of jurisdiction which was raised in the respondents' notice of preliminary objection. The preliminary objection was anchored on 2 grounds as follows:-

1. This Honourable Court lacks the requisite Jurisdiction to entertain this Suit as presently constituted in view of Order 11 Rule (1) of the Fundamental Rights Enforcement Procedure Rules, 2009, Section 46(1) and S25(1) of the 1999 Constitution as amended
2. Neither of the parties in this suit is an agent of the Federal Government and the subject matter of this suit does not fall within the items enumerated under section 251 (1) of the 1999 Constitution (as amended).

In the address learned counsel for the respondents, A.S. Gumba Esq. formulated a sole issue for determination which is whether this Honourable Court possesses the pre requisite jurisdiction to entertain this suit as presently constituted in view of O. 2 R. 1 of

the fundamental Right Enforcement Procedure Rules, 2009, Sections 46(1) and 251(1) of the 1999 constitution of the Federal Republic of Nigeria .

Arguing the issue learned counsel argued that for the Federal High Court to have jurisdiction to hear a fundamental right application, the subject matter of the application must fall under the items enumerated in section 251 of the 1999 constitution under which the court has jurisdiction to adjudicate. He further contended that the jurisdiction of Federal High Court is limited to only those specific matters enumerated in the section. Counsel therefore submitted that since the subject matter of the case does not fall under the specific matters on which the Federal High Court can adjudicate, and the respondents are not Federal agents the case of the applicant should be dismissed or struck out for want of jurisdiction. Counsel cited the following cases, inter alia, to support his submission.

1. Dr. Tunji Brainthwaite Vs Skye Bank Plc. (2012) LPELR 15532 S.C.

2. OSUNDE & ANOR. VS Nasiru Shaibu Baba (2014) LPELR 23217 C.A.
3. ADETONA VS IGILE GENERAL ENTERPRISES LTD (2011) 7 NWLR (Pt. 1247) 535 at 564.
4. Oamen VS Owenam (1993)8 NWLR (Pt. 311) 358 C.A.
5. Tukur Vs Government of Gongola State (1989)4 NWLR (PT. 117) 564 S.C.

In his written address learned counsel for the applicant argued that the argument of learned counsel for the respondent is a complete misconception of the decision in Dr. Tunji Braith Waite's case because according to him Tunji's case did not discuss issue of jurisdiction and therefore cannot apply in this case. Counsel therefore argued that the applicable and correct decision to follow in this case is the decision of the supreme court in GRACE Jack VS UNIVERSITY OF Agric, Makurdi (2004)5 MJSC 181 in which it was held that both the state and Federal High Court have jurisdiction to hear fundamental right cases under Section 42(1) of the 1979 constitution (now S. 46(1) at the 1999 constitution. Counsel also cited the cases of BRONIC MOTORS LTD VS WEMA Bank Ltd (1983)1 SCNLR 296 and

Tukur Vs Government of GONGOLA STATE (SUPRA). to further support his submission. Counsel therefore urged the court to dismiss the objection and proceed to hear the case.

Having briefly relayed the arguments of counsel, I think it will be of paramount importance if the facts of the case is stated here before I proceed to consider the arguments of counsel. The facts of the case as disclosed by the various affidavits and counter affidavits are that some time in the year 2016 the applicant herein who is an indigene of Bauchi State indicated his desire to perform Muslim Pilgrimage and he approached Bauchi State Pilgrim Welfare Board, that is the 2nd defendant in order to be included in the state contingents or would be pilgrims. That due to the large number of the intending pilgrims which outnumbered the available seats, all the would be pilgrims including the applicants were made to draw lots and at the end of the lots the applicant emerged victorious. Consequently the applicant was made to pay the sum of ₦850,000 to the 2nd respondent as part payment for the Hajj fare. However when it was time for the applicant to pay the balance, the Head of Administration of Darazo Local Government Council in person of Zarami Giade allegedly told

the applicant, point blank, that the remaining balance of the fare will not be accepted from him because Bauchi State Government has directed that the ₦850,000 he had already paid should be returned to him. The applicant further alleged that the decision to exclude him from performing the pilgrimage was because he was openly criticizing the government of Bauchi State and the ruling party in the state, that is, All Progressive Congress Party (APC).

Now having heard the submission of both counsel and the facts of the case, the only issue that arises for determination in my view is the one formulated by the counsel for the respondents which is whether having regard to the provision of Sections 46(1) and 251(1) of the 1999 constitution as amended Federal High Court has the subject matter jurisdiction to hear this case which is predicated on allegation of violation of the applicant's fundamental right to freedom of religion

To answer this question it is necessary to carefully study the provision of section 46(1) of the 1999 constitution as amended. The section provides as follows:

“Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to High Court in that State for redress.”

In interpreting this section the supreme court held in *Alhaji MUSE Vs EFCC & 2 Ors.* (2015)2 NWLR (Pt. 1473) 237 at 241 and *Grace Jack VS Federal University of Agriculture Makurdi* (Supra) as rightly argued by the learned counsel for the applicant that Federal High Court like the State High Court has jurisdiction to hear fundamental right application in respective of whether the parties are Federal or State agencies.

However the apex court has also held that for a Federal High Court to have jurisdiction in fundamental right case the transaction or dispute leading the filing of the action must fall under or relate to any of the items enumerated in section 251 (1) of the constitution on which Federal High Court has jurisdiction to adjudicate. In other words the application of Section 46(1) of the constitution is subject to the provision of Section 251 because it is this latter section that circumscribed the jurisdiction of the

court. See the case of Federal University of Technology Yola Vs Musa Sani (2005) 13 NWLR (Pt. 938)186.

Therefore the pertinent questions to ask is: does the decision of the respondent to exclude the applicant from the list of Bauchi State intending pilgrims or contingents tantamount to violation of his fundamental right to freedom of religion. In other words, does the performance of Muslims or Christian pilgrimage fall under any of the items enumerated in section 251 (1) of the constitution.

I have carefully studied the provision of section 251 of the constitution but quite frankly, religious pilgrimage is not listed as one of the items under the section. This being the case therefore, this court has no subject matter jurisdiction to hear the case of the applicant and I so hold. This decision is premised on the decision of the appellate courts in the following cases:

1. OLADIPO VS NIG. CUSTOMS (2009) A;; FWLR (PT. 478) 319 at 324-5.
2. ADETONA VS IGILE (2011) (Supra)
3. F R N VS CHIEF UDENSI IFEGWU (Supra)

4. ZAKARI VS I.G.P (2001) FWLR (Pt. 44) 509.

See also the case of Dr. Okoroma Vs Uba & Ors. (1999)1 NWLR PT. 587) P. 359 in which the issue was sufficiently dealt with in unambiguous terms as stated hereunder.

“A litigant who wants to enforce his fundamental rights is at liberty to go to the state or the Federal High Court. But where he goes to the Federal High Court, it must be on matters on which the Federal High Court has jurisdiction. The section merely gives the Federal High Court the jurisdiction to entertain matters relating to enforcement of fundamental rights but in doing that, it must be on matters in which it has jurisdiction to adjudicate “

However, let us suppose for the purpose of argument that this court has jurisdiction to hear this case. Let us also suppose that the allegation of the applicant is true that the respondents excluded him from performing pilgrimage on grounds of his political belief, does that amounts to breach of his fundamental

right to freedom of religion. Certainly the answer is no, for 2 reasons.

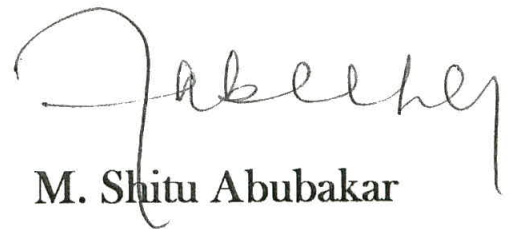
Firstly the practice by the state governments of airlifting their citizens to Mecca to perform pilgrimage at subsidized fare is a privilege and not a right in my view and cannot therefore be legally enforceable against the government.

Secondly the mere refusal of the state to air lift a citizen to Mecca to perform pilgrimage without more cannot be an infraction of his constitutional right to freedom of religion or political belief. However the situation may differ if the state use its machineries of government and prevented a citizen from making private arrangement to travel and perform his pilgrimage on grounds of his political belief. This is not the case in this.

Before I conclude I would like to express the view that it will be a bad precedence if a citizen of Nigeria is discriminated against in the performance of his religions obligation on the grounds of his political opinion as this will negatively affect the

development of the nation. May this never happen in all segments of our national lives. Ameen!

Finally and consequent upon the above analysis the case of the applicant must be and is hereby struck out for want of jurisdiction.



M. Shitu Abubakar

Judge

03/05/2017