

IN THE FEDERAL HIGH COURT OF NIGERIA

IN THE AKURE JUDICIAL DIVISION

HOLDEN AT AKURE

ON THIS THURSDAY THE 13TH DAY OF MARCH, 2014.

BEFORE HIS LORDSHIP: THE HONOURABLE JUSTICE I.M SANI-JUDGE

BETWEEN

SUIT NO: FHC/AK/CS/03/13

MORAYO PHILIP

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APPLICANT

AND

- 1. ADEKUNLE AJASIN UNIVERSITY, AKUNGBA – AKOKO**
- 2. THE SENATE, ADEKUNLE AJASIN UNIVERSITY AKUNGBA -AKOKO**
- 3. THE GOVERNING COUNCIL, ADEKUNLE AJASIN UNIVERSITY,
AKUNGBA AKOKKO**
- 4. THE VICE CHANCELLOR, ADEKUNLE AJASIN UNIVERSITY,
AKUNGBA AKOKO.**
- 5. THE REGISTRAR AND SECRETARY TO COUNCIL,
ADEKUNLE AJASIN UNIVERSITY, AKUNGBA -AKOKO**
- 6. INSTITUTE OF PART – TIME PROGRAMS, ADEKUNLE AJASIN
UNIVERSITY, AKUNGBA – AKOKO**

RESPONDENT

REPRESENTATION

EBUN OLU ADEGBORUWA, SAN - FOR THE APPLICANT.

HUSSEIN AFOLABI ESQ, - FOR THE RESPONDENTS.

JUDGEMENT

This is sequel to the Motion on Notice brought by the Applicant pursuant to section 36 of the 1999 Constitution of the Federal Republic Nigeria (As amended), Order 11 Rules 2, 3, 4, and 5 of the

Fundamental Rights (Enforcement Procedure) Rules 2009 and under the inherent jurisdiction of this Honourable Court praying for the following:

- A. **A DECLARATION** that the Applicant is entitled to be heard by the Respondents in the determination of her civil right and obligations as a student of the 1st Respondent, in exercise of her fundamental rights guaranteed under Section 36 of the 1999 constitution of the Federal Republic of Nigeria and Article 7 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Laws of the Federation of Nigeria, 2004.
- B. **A DECLARATION** that the failure, omission, neglect of the Respondents to hear the Applicant before determining her civil rights and obligations as a student of the 1st Respondent constitutes a flagrant violation of her fundamental rights guaranteed under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria and Article 7 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Law of the Federation of Nigeria, 2004 and is therefore unconstitutional, null, void and of no effect whatsoever.
- C. **A DECLARATION** that all decisions taken by the Respondents, their agents, servants or privies in the determination of the civil rights and obligations of the Applicant as a student of the 1st Respondent, without the opportunity of a fair and adequate hearing, constitutes a flagrant violation of the Applicant's fundamental rights guaranteed under Section 36 of the 1999 Constitution of the Federal Republic of Nigeria and Article 7 of the African Charter on Human and People's Right (Ratification and Enforcement) Act, Laws of the Federation of Nigeria, 2004 and is therefore unconstitutional, null void and of no effect whatsoever.
- D. **AN ORDER** setting aside, invalidating, nullifying, cancelling all decisions taken by the Respondents in the determination of the Applicant's civil right and obligations as a student of the 1st Respondent in violation of her right to fair hearing.
- E. **AN ORDER** forthwith reinstating the Applicant as a *bonafide* student of the 1st Respondent for refusing to comply with the Applicant's constitutionally guaranteed right to fair hearing.
- F. **A PERPETUAL INJUNCTION** restraining the Respondents, their servants, agents or privies from implementing, further implementing, executing, further executing or giving effect to any decision that may have been taken by the Respondents in the determination of the Applicant's civil rights and obligations without recourse to her right to fair hearing or from further violation of the Applicant's fundamental rights.

G. THE SUM OF ONE HUNDRED MILLION NAIRA ONLY (N100, 0000, 000) AS DAMAGES

being special, aggravated, punitive and general damages against the Respondents, jointly and severally, for their violation of the Applicant's fundamental rights.

H. AN APOLOGY from the Respondents to the Applicant to be published and circulated in the three National Newspaper namely: The Punch, the Guardian and the Nigeria Tribune, for their violation of the Applicant's fundamental rights.

I. SUCH FURTHER OR OTHER ORDERS as this Honourable may deem fit to make in the circumstances.

The application is supported by a 19 paragraphs affidavit duly deposed to by Applicant to which is attached exhibits "A-D" respectively. There is a statement pursuant to Order 11 Rule 3 of the fundamental Rights (Enforcement Procedure) Rules 2009 with the name, address and description of the Applicant, grounds upon which the reliefs are sought.

There is written address dated 14th January, 2013.

The grounds upon which the reliefs are sought are as follows:

- (i) The applicant is entitled to the fundamental right of fair hearing as guaranteed under Section 36 of the Constitution of the Federal Republic of Nigeria and the African Charter on Human and People's Right, in the determination of her civil rights and obligation by the Respondents.
- (ii) The Applicant was not given the opportunity to know the nature and source of the allegation made against her, neither was she afforded the opportunity to confront and challenge the source of the information leading to the allegation levied on her.
- (iii) The Applicant was not afforded fair or adequate opportunity offering her defence against the said allegation
- (iv) All the decisions of the Respondents, taken in violation of the fundamental rights of the Applicant are therefore null and void, having contravened the provisions of Section 36 of the Constitution of the Federal Republic of Nigeria.
- (v) The Applicant is entitled to a declaration that purported expulsion having being executed in violation of Section 36 of the Constitution of the Federal Republic of Nigeria is unconstitutional, null and void and of no effect whatsoever.
- (vi) The Applicant is entitled to an injunction restraining the Respondents from interfering with, disturbing or in any manner hindering the rights and benefits of the Applicant as a student of the 1st Respondent.
- (vii) The Applicant is entitled to damages against the Respondents jointly and severally for violation of her fundamental rights.

In response to the above, the Respondents filed a 16 paragraphs counter-affidavit duly deposed to by Mr Bamidele Olotu, the 5th Respondent to which is attached exhibits “AAU1”, “AAU2”, “AAU3”, “AAU4 “, “AAU5” respectively. A written address dated 28th January, 2013 was also filed by the Respondents.

The Applicant in response filed a 21 paragraphs further affidavit to which is attached exhibits “E-H” and a written address dated 19th February, 2013. There is a further affidavit of 13 paragraphs duly deposed to by the Applicant to which is annexed exhibits 1, 2 & 3 respectively.

The Respondents filed a Notice of Preliminary Objection dated 18th March, 2013 and in response, the learned counsel for the Applicant filed a written address dated 29/04/13. There is also a written address on the Notice of Preliminary Objection filed by the Respondents.

There is a reply on points of law filed by the Respondents dated 26/01/14 and filed 27/01/14.

Learned counsel relied on all above processes and adopted their respective written addresses.

In accordance with the provision of Order VIII Rule 4 of the Fundamental Right (Enforcement Procedure) Rules 2009, the Preliminary Objection was taken along the substantive application.

Now, where such a method is adopted by the court, the Preliminary Objection shall first be considered and determined before delving into the merits or substance of the case. See **Odu vs Agbor – Hemeson (2003) 1 NWLR (Part 802) 624, Obum vs Ebu (2007) 6 WRN 105.**

It is pertinent to state that I have considered the submission of learned counsel for the Applicant in the filing of the Notice of Preliminary Objection as provided for under Order VIII Rule 2 of the Fundamental Rights (Enforcements Procedure) Ruled 2009 and the response of learned counsel for the Respondents.

Perhaps, I should state at this this juncture that in matters relating to the enforcement of fundamental rights, the court are less slavish to the Rules of Court and their applications. Strict adherence to legalism may result in whittling down the substance of the fundamental rights. See **Nnamdi Azikwe vs Casmir Nwafor (1991) NWLR (Part 585) Page 116 at 120 and 121.**

The issue of Jurisdiction is fundamental. Jurisdiction is the blood that gives life to the survival of an action in a court of law. A party cannot run afoul of raising jurisdiction too early or

belatedly. It can be raised at any stage of the proceedings even on appeal up to Supreme Court.
See **Iwuagolu vs Azyka (2007) 5 NWLR (Part 1028) Page 628 Paragraph G-H**

Based on the above therefore, I hold the view that the Preliminary Objection filed by the Respondents is not an abuse of court process and therefore valid and properly filed before this court.

Now, to the Notice of Preliminary Objection. The grounds for the objections are as follows:

1. The Applicant's cause of action arose on 02/11/2011 sequel to her expulsion from the 1st and 6th Respondents as per exhibit "C" attached to the Applicant's affidavit in support of her motion dated 14/01/2013.
2. The main plank of the Applicant's case is that of her expulsion from the 6th Respondent.
3. The Applicant has asked this Honourable Court for an order setting aside the said expulsion and an order reinstating her as a student of the 1st Respondent as per relief D and E of her motion dated 14/01/2013 respectively.
4. The Applicant ought to have commenced this action under the Ondo state High Court (Civil Procedure) Rules, 2012 by taking out a writ of summons against the Respondents and not under the Fundamental Rights (Enforcement Procedure) Rules as presently constituted.
5. Whether or not the breach of the Applicant's rights as a student of the 1st and 6th Respondents is ancillary to the main i.e. the Applicant's expulsion from the 1st and 6th Respondents

Arguing the application, learned counsel for the Respondents Hussein A. Afolabi Esquire formulated a sole issue for the determination of this court viz:

Whether this suit is properly constituted and commenced by the proper procedure.

Learned counsel referred to the case of **Egbuonu Vs. Borno Radio Television Corporatin (1997)12 NWLR (Part 531)29 at 40-41 paragraphs G-A** and paragraphs 11-18 of the affidavit in support of the Applicant's application and submitted that where the main claim is not the enforcement of a breach of right, the action must be commenced under the High Court of Civil Procedure Rules of the state concerned and not under the Fundamental Rights (Enforcement Procedures) rules.

He submitted that the main claim of the Applicant/Respondent is her expulsion from the 1st and 6th Respondents and that the alleged breach of her right to fair hearing by the Respondents before her expulsion is only ancillary to the main claim. He referred to the case of **WAEC Vs Adeyanju (2008) NWLR (Part 1092) 270 at 295-296 Paragraphs G-B** and urged the court to so hold.

On how to distinguish the main/principal relief from the ancillary/ subsidiary relief learned counsel referred to the cases of **Egbonu Vs B.R.T.C (supra) and WAEC Vs Adeyanju (supra)** and submitted that the court will consider in totality all reliefs sought by the Applicant *vis-a-vis* the fact relied upon by the Applicant i.e. the facts necessitating the Applicant's claim for the reliefs.

He contends that from the reliefs claimed by both Applicants in the above cases, the Supreme Court considered the "enforceable" reliefs as the main reliefs in both cases and that a "declaratory" relief cannot be a main relief. This is because, according to learned counsel a declaratory relief merely declares the right of the parties and therefore not enforceable. He referred to the case of **Abion Construction Ltd. Vs. Rao Investment Pro Ltd. (1992) NWLR (Part 219) 583 at 596 - 597, Paragraphs H-A.**

On the other hand, the learned counsel argued that an enforceable relief as the name implies is enforceable and it is what the Applicant hopes to get or hopes to achieve from the totality of all the reliefs claimed or from the outcome of the suit. And where a "declaratory" relief is bound up to with an "enforceable" relief in a suit, the "enforceable" relief will be the main/principal relief and the alleged breach of the fundamental rights of the Applicant in the case at hand to fair hearing flows from expulsion from the 1st and 6th Respondents.

Learned counsel referred to paragraphs 11- 18 of the affidavit in support of the motion dated 14/01/2013 and contends that the main plank of the Applicant's claim is the determination of her right as a student of 1st and 6th Respondents vide exhibits "C" attached. He referred to relief D and E which according to learned counsel is the main plank of the Applicant's claim and not the alleged breach of her right to fair hearing leading to her expulsion.

Finally, the learned counsel submitted that for the Applicant to properly claim these reliefs she ought to have taken a writ of summons against the Respondents in compliance with Ondo State High Court (Civil Procedure) Rules 2012 and not an action under Fundamental Rights (Enforcement Procedure) Rules.

Learned counsel to the Respondents cited the cases of **Madukolu Vs Nkedilim (1962)1 AA NLR 587 at 595, Rossek Vs ACB Ltd. (1993)8 NWLR (Part 312)382 at 437, Paragraphs C-G** and urged the court to strike out this suit as this Honourable Court lacks the jurisdiction to adjudicate over same

Responding, learned counsel for the Applicant, **Ebun-olu Adegboruwa** Esquire formulated two issues for the determination of this court viz:

- i. **Whether** the Preliminary Objection of the Respondents dated 18th March, 2013 is competent, valid and properly before the court.*

- ii. ***Whether the suit of the Applicant is properly constituted and commenced by the proper procedure.***

Section 36(1) of the 1999 constitution on fair hearing cannot be said to be an ancillary claim and that the above reliefs are separate and distinct and cannot be said to be dependent upon or ancillary to another. That once any of the above reliefs can be properly determined then there is jurisdiction upon the court to adjudicate upon the case of the Applicant. He urged the court to so hold.

Learned counsel referred to Section 17 of the Adekunle Ajasin University Law 2007 which provides for the discipline of students. Section 17(10) states as follow: *“Nothing in this section shall affect any power of a court competent jurisdiction to enforce the fundamental right of any aggrieved citizen as enshrined in the Constitution of Federal Republic of Nigeria 1999”*

It is the contention of learned counsel that the above provision expressly confers jurisdiction on this Honourable court where a student alleges that his/her fundamental right have been infringed upon.

He further contends that the judicial precedents relied upon by the Respondents did not decide on such an express provision of the law as Section 17(10) of the Adekunle Ajasin University Law. He urged the court to liberally interpret the above provision of the Applicant to affirm her right of access to court. That none of the cases cited by the Respondents considered a provision similar to that of Adekunle Ajasin University Law which expressly gives jurisdiction to the court.

He referred to the cases of ***Schrioder Co. vs Major vs Co. Ltd (1989)2 NWLR (Part 101 SC at Page 1***, and ***Egbuonu Vs Borno Radio Television Corporation (supra) WAEC Vs. Adeyanju (Supra)*** cited by the Respondents and submitted that if all the cases cited are relevant to this application, then they are considered as a general principle which has been overridden by the specific law in section 17(10) of the Adekunle Ajasin University law.

On the contention of the Respondents about the reliefs sought by the Applicant being ancillary, learned counsel referred to order 16 Rule 5 Federal High Court (Civil Procedure) Rules 2009, the case of ***Dantata Vs Mohammed (2007) 7 NWLR (Part664) Page 176 at Page 196 Paragraph D-F***, Section 17(10) of the Adekunle Ajasin University law and submitted that a single declaratory relief is sufficient to sustain a suit. Refer to ***Owodunmi Vs. Reg. Trustees of CCC (2000) 10 NWLR (Part675) Page 315 at 355 Paragraphs E-G***

Learned counsel reproduced the reliefs sought by the applicant and contends that the main relief sought is for the Applicant to be given fair hearing by the Respondents in the determination of her civil rights and obligation as a student of the Respondents and that the other reliefs are

consequential to the declaratory reliefs and will be granted by this court if the declaratory reliefs succeeds even if the Applicant did not ask for the other reliefs.

Learned counsel further submitted that the Applicant's expulsion was as a result of the lack of fair hearing in the determination of her rights by the Respondents and that, according to the learned counsel is the grouse of the Applicant.

He finally submitted that the Applicant had actually instituted a suit at the High Court of Ondo State Akure in Suit No: AK/232/2012, but this was frustrated by the Respondents who filed a Notice of Preliminary Objection. Learned counsel urged the court to dismiss the Preliminary Objection with substantial costs.

However, in his reply on point of law, learned counsel for the Respondents submitted that Section 17 (10) of the Adekunle Ajasin University law merely reiterate the statutory powers of a court of competent jurisdiction to enforce the fundamental right of an aggrieved citizen as enshrined in the constitution. It is the contention of learned counsel that aggrieved persons must comply with the substantive and procedural law in the enforcement of his/her fundamental rights.

That where an aggrieved person is required by any substantive and procedural law to take out a writ of summons then he/she must take out a writ of summons and if the action is brought under Fundamental Rights (Enforcement Procedure) Rules then the said action is incompetent and liable to be struck out. He urged the court to so hold.

On Order 16 Rule 5 of the Federal High Court Civil Procedure Rules 2009, learned counsel submitted that this Rules does not assist the Applicant and that the said rule deals with the power of the Federal High Court to make declaratory order generally whether or not consequential reliefs are claimed with it.

He also referred to the cases of *Dantata Vs Mohammed (supra) Owodunmi Vs Reg. Trustees of CCC* and submitted that they are not apposite to the facts of this case and are completely different. That the plaintiffs in both cases initiated or commenced their respective suit vide a writ a of summons and none of these cases was initiated under Fundamental Rights (Enforcement Procedure) Rules and none was for enforcement of fundamental right and the contention of the Applicant in her application is in respect of her expulsion from the 1st Respondent over which the court has no jurisdiction and it not being a fundamental right issue. He urged the court to strike out the suit.

The above represent the submission of learned counsel. I commend them for their industry and have read with some profit the cases cited. The gravamen of the Respondents/Applicant's preliminary objection is that the main claim of the Applicant is her expulsion from the 1st -6th

Respondents and that the alleged breach of her right to fair hearing by the Respondents before her expulsion is only ancillary to the main claim and that the Applicant ought to have commenced this action under the Ondo State High Court taking under a writ of summons and not under Fundamental Rights Enforcement Procedure.

On the other hand, the Applicant's counsel is of the view that the declaration for the enforcement of breach of the section 36 (1) of the 1999 constitution on fair hearing cannot be said to be ancillary. The cases of Egbuonu Vs BRTC (supra) WAEC Vs Adeyanju (supra), according to learned counsel cannot serve as judicial precedent for the instant case, as the facts and the circumstances are totally different.

The mode of commencement of an application under the Fundamental Rights (Enforcement Procedure) Rules 2009 is fundamental and Order IX (i) (ii) of the Fundamental Rights (Enforcement Procedure) Rules 2009 underscore this point and provides:

"IX Where at any stage in the course of or in connection with any proceedings there has by any reason of anything done or left undone, been failure to comply with the requirement as to time, place or manner, or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to

- i. Mode of commencement of the application; or*
- ii. The subject matter is not within chapter IV of the Constitution or the African Charter on Human and Human and People Rights (Ratification and Enforcement) Act."*

Where there is non-compliance with the mode of commencement of an application under the rules, then it becomes a matter of substantive law which cannot be waived as it is now a jurisdictional matter which has to be determined since jurisdiction is a fundamental requisite in the adjudication of any matter, it is the life wire of all suit.

Now I pose to ask this question, *what determines the jurisdiction of court over application for enforcement of fundamental rights?* It has been held in the case of Unical v Ugochukwu (No 1) (2007)17 NWLR (Part 1063) Page 246 Paragraph B-D, as follows

"The reliefs sought in a fundamental right application are the paradigm for determining whether or not a court is seized of jurisdiction in a particular case. When the claim cannot be vividly presented under section 33-46 of the 1999 constitution, the court would have no jurisdiction to hear or grant any order in the matter"

I have carefully gone through the reliefs sought by the Applicant earlier reproduced at the beginning of this judgement in respectful view, I am in no doubt at all, that the main claim of the

Applicant is her expulsion from the 1st - 6th Respondents and that the alleged breach of her right to fair hearing by the Respondents before her expulsion is only ancillary to the main claim and I so hold

In the case of **Borno Radio Television Corporation Vs. Egbunu (supra) at page 90** Adio JCA (as then he was) observed:

*“The competence of any court to exercise jurisdiction in relation to an action before it depends on certain conditions which Bairamin FJ (as he then was) set out in **Madukolu & Ors. Vs Nkedilim (1962) 2SC NLR 341 (1962) NLR, at Page 595.** His lordship stated inter alia as follows “Before discussing those portions of the record, I shall make observation on jurisdiction and competence of a court. Put briefly, a court is competent when;*

- 1. It is properly constituted as regards numbers and qualifications of the members of bench, an no member is disqualified for one reason or another;*
- 2. The subject matter of the case is within jurisdiction and there is no creature in the case which prevents the court from exercising its jurisdiction; and*
- 3. The case comes before the court initiated by due process of the law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The combined effect of the second and the third conditions mentioned above is that when the main or principal claim is in an application, not an enforcement of a fundamental right, the court has no jurisdiction to entertain it under the Fundamental Rights (Enforcement Procedure) Rules 2009. That is the position in the case of the present application of the Applicant, the Applicant’s application is not properly before the court”*

It is therefore my considered view that having regard to the main claim of the Applicant, this action is not completely and fully constituted as an action for the enforcement of fundamental rights as encapsulated in Chapter IV of the 1999 Constitution and ought to have been commenced under High Court of Ondo State by taking out a writ of summons and I so hold. In the case of **University of Ilorin Vs. Oluwadare (2006) All FWLR (part 338, Page 747 at 755, Paragraphs E-F** the Supreme Court held;

“The right of studentship is not among the right guaranteed by the 1999 Constitution, the only appropriate method by which a party could have challenged his expulsion was for him to have commenced the action by a writ of summons under the applicable rules of court”

Learned counsel for the Applicant placed heavy reliance on Section 17(10) of the Adekunle Ajasin University Law 2007 and without running afoul of repetition the section provides:

“Nothing in this section shall affect any power of a court of competent jurisdiction to enforce the fundamental right of any aggrieved citizen as enshrined in the constitution of the Federal Republic of Nigeria 1999”

I have carefully considered the above provision and with respect to learned counsel for the Applicant, the section only reiterates the statutory powers of the court to enforce the fundamental right of any aggrieved citizen as enshrined in the Constitution and will not in my respectful view obviate the need to strictly comply with the mode of commencement of enforcement of such rights in accordance with the rules.

I therefore agree with learned counsel for the Respondents that where a person is required by any substantive and procedural law to take out a writ of summons he or she must take out a writ of summons and where the action is brought under the Fundamental Rights (Enforcement Procedure) Rules, the said action is incompetent and I so hold.

Having held that the main relief claimed by the Applicant is in respect of her expulsion from the 1st Defendant, Order 16 Rule 5 of the Federal High Court (Civil Procedure) Rules 2009 relied upon by learned counsel cannot avail the Applicant and the cases of **Dantata Vs. Mohammed (supra)** and **Owoduni Vs. Reg. Trustees of CCC (supra)** cited are not apposite to the facts of this case and did not further help the case of the Applicant and I so hold.

Based on the above and having held that the principal claim of the Applicant is that of her expulsion from the 6th Respondent, the jurisdiction of this court cannot be properly exercised.

Consequently, I am of the view that it is no longer necessary to delve into the substantive application. The suit is accordingly struck out

Hon. Justice I.M. Sani

14/03/14