

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP : HON. JUSTICE Y. HALILU
COURT CLERKS : JANET O. ODAH & ORS
COURT NUMBER : HIGH COURT NO. 24
CASE NUMBER : SUIT NO: CV/433/2018
DATE: : WEDNESDAY 26TH FEBRUARY,
2020

BETWEEN:

1. HABIBA ISHAQ ISA
2. MASTER BILAL ISHAQ BELLO
(Suing by his mother & next friend
– HabibaIshaq Isa)

CLAIMANTS

AND

HON. JUSTICE ISHAQ USMAN BELLO ...
DEFENDANT

RULING

This ruling is at the instance of Notice of Preliminary Objection filed by Defendant's counsel, Y.C Maikyau, SAN pursuant to Order 43 Rules 1(1) and 3 of the Rules of this court and section 2(2) of the Area Court Act, 2020, against the Claimants' action.

The gist of the matter is that Claimants instituted action against the Defendant seeking the following declarations:-

1. A declaration of court that the Defendant is the biological father of Bilal Ishaq Usman Bello (the 2nd Claimant) born on the 26th day of February, 2013 in lawful wedlock of the Defendant with the 1st Claimant/Plaintiff.
2. A Declaration of court that the Defendant is bound by law as the biological father of Bilal Ishaq Bello (the 2nd Claimant) to provide for his upkeep within his income and emotional support him as his father.

3. An Order of Court perpetually restraining the Defendant whether by himself or through his other children, wives, brothers, sister, friends, cohorts or howsoever known from declaring, asserting or saying that Bilal Ishaq Usman Bello (2nd Claimant) was not sired by him.
4. An Order of court directing the Defendant to provide for the monthly upkeep of the 2nd Claimant.

Upon service of writ on the Defendant, the Defendants counsel then filed a notice of preliminary objection relying on the aforementioned provision of the Rules of this court and Area Court Act.

The grounds as contained in the Preliminary Objection are as follows:-

- a. This suit as presently constituted raises the question of the paternity of the 2nd Plaintiff allegedly born during the subsistence of the marriage contracted in

- accordance with Islamic Law, between the 1st Plaintiff and the Defendant.
- b. The suit raises the question of Islamic Personal Law as it related to the paternity of the 2nd Plaintiff and thus can only be determined by the application of Islamic Personal law of the Maliki School of jurisprudence.
 - c. This Honourable court is not empowered by law to hear and determine matters relating to Islamic Personal law.
 - d. The jurisdiction to hear and determine questions of Islamic personal law is vested in the Area Court established under the FCT Abuja Area Courts (Repeal and Enactment) Act 2010.
 - e. It amounts to a waste of judicial time to entertain a matter without jurisdiction as the proceedings are a nullity.

In support of the Preliminary objection is a written address. In its written address learned counsel for the Defendant /Applicant contended that, in determining whether a court has jurisdiction to entertain any matter before it, the Supreme Court has laid down the following:-

- i. If the court properly constituted as regards number and qualifications of the members of the bench, and no member is disqualified for one reason or the other.
- ii. The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and
- iii. The case comes before the court of law initiated by due process of law, and upon fulfilment of any other condition precedent to the exercise of jurisdiction.

iv. Any defect in compliance is fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the jurisdiction.

Learned counsel submit that from paragraph 3, 4 and 5 of the statement of claim, and the reliefs sought in the writ of summons, the suit raises the issue of the paternity of the 2nd Claimant, alleged to have been born during the subsistence of the marriage between the 1st Claimant and the Defendant in the celebrated marriage under the Islamic customary law on the 26th day of June, 2008.

Counsel argued that this court has no jurisdiction to adjudicate on the paternity of a child alleged to have been born from a marriage contracted under Islamic law. ***OKOROCHA VS UBA PLC. (2018) 1 NWLR Page 441.***

Learned Senior Counsel contended further that, section 255(1) of the Constitution of the Federal Republic of Nigeria and section 257 does not confer jurisdiction on this court to entertain matters of Islamic personal

law, but that it is the Area court by virtue of section 2(2) of the Area Court Act and therefore, urge this court to decline jurisdiction.

Upon service, Claimants filed their written address in opposition to the Defendant preliminary objection and formulated a lone issue for determination to wit;

Whether it is Customary/Area Court that is vested with the jurisdiction to hear and determine the Plaintiffs action or the High Court of the Federal Capital territory.

Arguing on the lone issue, learned counsel argued that the Defendant merely hinged his Preliminary Objection on Order 43 Rules 1 (1) and 3 of the Rules of this court 2018 and section 2 (2) of the Area Court Act 2010.

It is the argument of learned counsel that section 2(2) of the Area Court Act as cited by the Defendant's counsel does not define or establish the jurisdiction of the Area Court.

Learned counsel contended further that Order 43 Rules 1(1) and (2) of the Rules of this Court, 2018 provides as thus;

1. Whereby in this Rules any application is authorised to be made to the court, it shall be made by motion which may be supported by affidavit and shall state the Rule of court or enactment under which the application is brought.
2. Every application shall be accompanied by a written address.

Counsel submit that the rules set out above did not say this court does not have the jurisdiction to deal with the matters pleaded in the Plaintiff's statement of claim and to grant the claims set out there under.

Learned counsel cited section 1 of the Child Rights Act LFN 2004 which provides that, "in every action concerning a child, whether undertaken by an individual,

public or private body, institutions or service, court of law, or administrative or legislative authority, the interest of the child shall be primary consideration.”

Counsel contend that section 6(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is superior court of record and the guardian of the provisions of the Constitution wherein it is provided that 2nd Claimant should not be discriminated against. And that no law or custom that stands in the way of the constitution should be allowed to stand tall, No matter the circumstance. ***TIMOTHY VS OFORKA (2008) 9 NWLR (Pt. 1091) P. 204 at page 213.***

Learned counsel argued that paragraphs 1 to 12 of the statement of claim of the Plaintiffs is founded on the paternity of the 2nd Plaintiff and no more.

Counsel contended and relied on section 63 of the Child Right Act LFN 2004 which provides as follows:-

“In any civil proceedings in which the paternity or maternity of a person falls to be determined by the court, hearing the proceedings, the court may, on an application by a party to the proceedings, give a direction for;

- a. The use of scientific tests, including blood tests and Deoxyribonucleic Acid tests, to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person; and*
- b. For the taking within a period to be specified in the direction, of blood or other samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons.”*

Counsel further argued that under section 277 of the Child’s Right Act, the word “court” means the family

court established under section 149 of this Act, and that the court here means High Court.

Finally court was urged to dismiss the application.

Upon service, Defendant filed reply on points of law where Defendant contended that on the application of Child's Right Act 2003, a family court does not have jurisdiction because, the Claimants stated clearly that their marriage was contracted under Islamic law.

Counsel argued that the jurisdiction conferred on the family court with respect to acquisition of parental responsibilities is provided for in section 68 of the Child's Right Act 2003, and it relates to where the father and mother of a child were not married to each other at the time of the birth of the child.

Learned counsel finally contended that the High court does not have jurisdiction to adjudicate on Islamic Personal laws.

Court:- I have gone through the Notice of Preliminary Objection filed by the Defendant/Applicant and the reaction of the Claimants/Respondents, I shall be brief but succinct in addressing the issue of jurisdiction.

It is trite that the inherent jurisdiction of the court is not exercisable when the court lacks jurisdiction. What this means is that the inherent jurisdiction of a court only comes in where it has jurisdiction. Court shall of importance determine its jurisdiction first before being called upon to exercise any inherent jurisdiction. ***IWUJI & ORS VS GOVERNOR OF IMO STATE & ORS (2014) LPELR 22824 (CA)***

In determining whether the court has jurisdiction or not, what must be first considered are:-

- a. The Plaintiff's claim as contained in the writ of summons and statement of claim, where the action is commenced by a writ of summons or the affidavit in support of originating process and the relief sought

where the action is commenced by an originating summons.

- b. The statute creating the court. This is because courts are a creature of statute and it is the statute that creates a particular court that also confers its jurisdiction. Jurisdiction in this instance can only be extended by the legislature and not by the court. ***PAM & ORS VS ABU & ORS (2013) LPELR 21486 (CA).***

I shall beam my judicial searchlight on the writ of summons to ascertain whether the court has jurisdiction or not.

I shall for the sake of clarity reproduce the relevant paragraph of statement of claims of the Plaintiffs.

Paragraph 3

“The Defendant took the Plaintiff’s hand or celebrated marriage with the Plaintiff under the

Islamic Customary Law on the 26th day of June, 2008 in a marriage ceremony which held in the family house of the Plaintiff in Zaria Kaduna State whereat all the family members and paterfamilias of both the Plaintiff and the Defendant were in full attendance

together with friends and well wishers of the Plaintiffs and the Defendant.”

Paragraph 4

“The Plaintiff aver that after the celebration of marriage, she moved into the home of the Defendant and cohabited with the Defendant as husband and wife for almost seven (7) years as the marriage was dissolved by the Defendant on the 7th day of May, 2015 being about one month to the anniversary of the celebration of the marriage. The

divorce letter made by the Defendant under his hand and served on the Plaintiff is pleaded and shall be relied upon at the trial of the suit.”

Paragraph 5

“While the marriage between the Defendant and the Plaintiff subsisted, the Plaintiff conceived of a child sired of the Defendant who was given birth to on the 26th day of February, 2013. On the birth of the child, the parties carried out the customary celebration for the coming into the world of a new child and the Defendant name him Bilal.

Paragraph 6

“The Plaintiff avers that in the divorce letter pleaded in paragraph 4 above, at the last paragraph of same Defendant stated thus “at an appropriate time I will communicate to you my position in respect of the child.” The Plaintiff avers that this

statement of the Defendant in the divorce letter redacted above unsettled the Plaintiff seriously causing the Plaintiff to approach the Defendant on three separate occasions, after the divorce, to request him to give flesh or particulars of what he meant by the statement in the letter. On all the three occasions the Plaintiff approached the Defendant for clarification of the statement, the Defendant gave several excuses for not rendering the meaning of the content of the statement as, according to him, the time was not right/ripe for that.”

As stated in the preceding part of this Ruling, it is trite that when the issue of jurisdiction is raised, the court must carefully examine the writ of summons and the statement of claim to see whether it has the requisite jurisdiction to entertain and to determine the matter.

Jurisdiction can be raised as ground to challenge the competence of an action from the point of the subject

matter or parties.i.e subject matter jurisdiction or parties jurisdiction.

From the gamut of claimant's claims and front loaded statement on oath, the Kernel of the preliminary objection is subject matter.

From the paragraphs of the statement of claim and the reliefs sought in the writ of summons this suit raises the issue of the paternity of the 2nd Claimant alleged to have been born during the subsistence of the marriage between the 1st Claimant and the Defendant.

Indeed, the Claimants stated in their writ and statement of claim that the 1st Claimant got married to the Defendant on the 26th of June, 2008 according to Islamic Law, while the 2nd Claimant was born on the 26th of February, 2013.

1st Claimant was divorced by the Defendant on the 7th of August, 2015. In paragraph 6 of the statement of claim, the Claimant quoted the letter of divorce issued the

1st Claimant as thus “at an appropriate time I will communicate to you my position in respect of the child.”

To my mind, all these constitutes matter of Islamic personal law, which have been placed in the domain of the court established by the FCT Abuja Area Court (Repeal and Enactment) Act 2010.

Indeed what constitute Islamic personal law has been defined by section 51 of the said Act, in reference to the meaning of Islamic personal matters in section 10 of the Sharia Court of Appeal Act Cap 550, Laws of FCT which provides thus;

- a. A question of Islamic law regarding a marriage concluded in accordance with the law, including a question regarding the dissolution of that marriage or a question that depends on the marriage relating to family relationship or the guardianship of an infant,

- b. Where all the parties to the proceedings are Muslims, a question of Islamic Law regarding a marriage, including the dissolution of that marriage, or regarding family relationship, a founding or the guardianship of an infant.
- c. A question of Islamic Law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim,
- d. A question of Islamic Law regarding an infant, prodical or person of an unsound mind who is a Muslim or the maintenance of guardianship of a Muslim who is physically or mentally infirm; or
- e. Where all the parties to the proceedings (whether or not they are Muslims) have by writing under their hand requested the court that hears the case in the first instance to determine that case is accordance with Islamic Law any other question.

From the above therefore, it is obvious that issues relating to paternity of a child, custody of a child allegedly born during the subsistence of a marriage concluded in accordance with the Islamic personal law, raises questions of Islamic personal law. I so hold.

On whether the provision of child's Right Act, 2003 is applicable, I must observe here that the Claimants clearly stated that the marriage which subsisted between the 1st Claimants and the Defendant was conducted in accordance with Islamic law. It is also alleged that, during the subsistence of the said marriage, the 1st Claimant conceived and gave birth to the 2nd Claimant, whose paternity, has been denied by the Defendant.

These facts are contained in paragraphs 3, 4, 5 and 6 of the statement of claims as earlier quoted in the preceding part of this Judgment.

Indeed, the Claimants by this action, seek for a determination that the Defendant is the biological father

of the 2nd Claimant; an order directing the Defendant to take custody and or provide upkeep, emotional support for the 2nd Claimant, and an order of perpetual injunction restraining the Defendant from denying the paternity of the 2nd Claimant.

From the facts before the court, it is obvious that this matter falls under Islamic personal law, which has been placed in the domain of the court established by the FCT Abuja Area Court (Repeal and Enactment) Act 2010.

I have no difficulty coming to the conclusion that FCT High Court is not the appropriate court to institute this present action.

Preliminary objection filed by Defendant's counsel, Y.C Maikyau, SAN, was timely, exhaustive and legally apt. On the whole, preliminary objection is upheld.

Consequently, suit **No. CV/433/2018** is hereby struck – out for want of jurisdiction.

Signed
Hon. Judge
26th February, 2020

APPEARANCES

T. AOsaje with I.D.Egwu – for the Claimants.

Y. C Maikyau, SAN – for the Defendant with A.T Aboki, A.C Ekwoaba, Aisha Usman, M.F Belgore and O.O Amadi.