

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT GUDU - ABUJA**

**ON WEDNESDAY THE 11TH DAY OF MARCH, 2020.**

**BEFORE HIS LORDSHIP ; HON. JUSTICE MODUPE OSHO-ADEBIYI**

**SUIT NO. PET/089/2019**

**ESTHER ONINYECHI EGBE ----- PETITIONER**

**AND**

**M. W. O DANIEL EGBE-----RESPONDENT**

**RULING**

Petitioner filed a notice of petition seeking for judicial separation to Respondent also seeking for custody and maintenance of her 3 children. Petitioner alongside the notice of petition also filed a Motion exparte dated 20/12/2019 praying the court to grant custody of the 3 children of the marriage to the petitioner or in the alternative granting petitioner access to her 3 children currently at an undisclosed location. The application is supported by a 29 paragraphs affidavit deposed to by the Petitioner and a written address. It is worthy to note that prayers contained in the petition seeking for custody of the children are simultaneously introduced in the first leg of Applicant motion exparte. The issue for determination is

“Whether prayers of Applicant/Petitioner can be determined at this interlocutory stage via a motion exparte”?

The Supreme Court in *Leedo Vs. Bank of the North* 1998 7 SCNJ 328 at 352 - 353 Per Ogundare JSC (of blessed memory) noted with approval a drawn up distinction between motion on notice and motion ex-parte and when they can be applied-a holden of Mohammed JCA (as he then was) in *Bayero Vs. Federal Mortgage Bank of Nigeria Ltd. & Another* 1998 2 NWLR 509 at 529 - 530 where he said; "Motions generally are of two types; Motion on Notice and Ex-parte Motion. A motion is on notice where the applicant has put on notice or awareness the attention of the other party or parties involved of the existence of the motion, an ex-parte motion is one in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. Both are acceptable in law. The general practice; however is that motions are filed in Court on notice. Ex-parte motions are filed but sparingly considered by the Court in extreme or special circumstances. The decision whether an application should be brought ex-parte or on notice is one to be considered in the light of the prevailing circumstances and not to be based on the dictates of the applicant's or the judge's whims." An application ex-parte could be made in two circumstances; (i) When from the nature of the application, the interest of the adverse party will not be affected. (ii) When time is the essence of the application and In these two situations a Court will be right in exercising its discretion in granting a motion ex-parte. But where the motion brought before the Court will affect the interest of the adverse party, a Court of law should insist and order that the adverse

party be put on notice these can be done in either of two ways:-(i) The Court orders that the application ex-parte be served on the adverse party which automatically makes it a motion on notice; or (ii) The applicant files a separate motion on notice."

The supreme court in **ELEBANJO VS DAWODU (2006) I5 NWLR (Pt.1001) 76 @ 137 paragraphs E-F**, per Ogbuagu JSC noted that once an issue cannot be determined on the pleadings, the court ought to proceed to full trial of the case and decide the part /issue afterwards. An interlocutory application as raised by the Petitioner/Applicant in her motion exparte ceases to be interlocutory once the points could not be decided without evidence being led; in essence such application removes the substantrum from a case.

An interlocutory order means any order than the final judgment in action, hence where an interlocutory application as raised in this motion exparte delves into the substance of a case, such application has left the purview of interlocutory and delved into the substantive matter. The Supreme Court has advised in such a situation that the court should abandon the interlocutory application and proceed with the substantive matter. I therefore hold that issues raised are not such that can be decided at on interlocutory stage.

Considering the fact that the rights and responsibilities of children are involved in the substantive suit before me, the law enjoins me to consider the best interest of the "child" in the hearing of this matter in deciding whether to grant granting of the application in the substantive matter.

Consequently, this court will give accelerated hearing to the substantive suit while the motion ex parte is hereby struck out.

**Parties:** Absent.

**Appearances:** Micheal K. Bielonwu appearing with M. I. Keyi and Q. N. Chuta for the Petitioner.

**HON. JUSTICE M. OSHO-ADEBIYI**

**JUDGE**

**11<sup>TH</sup> MARCH, 2020**