IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA, COURT 4, F.C.T., ABUJA.

BEFORE HIS LORDSHIP: HON. JUSTICE O. O. GOODLUCK

MOTION NO. FCT/HC/M/1216/2019

B E T W E E N:s

OLOROGUN MOSES TAIGA } **CLAIMANT/RESPONDENT**

AND

MISS. RABI ACHIMUGU } **DEFENDANT/APPLICANT**

R U L I N G

The Defendant/Applicant is by a Notice of Preliminary Objection contending that this Court lacks the jurisdiction and competence to entertain this suit hence it is to be struck out in its entirety.

The objection to jurisdiction are predicated on four grounds, which are that:

a) This Honourable Court is not properly constituted to confer her with adequate jurisdiction to adjudicate on this matter;

b) The facility Court is conferred with exclusive jurisdiction to entertain child related matters;

c) Reliefs in the nature of jactitation can only be entertained by an action commenced under the Matrimonial Cause Act and Rules or a customary or Area Court depending on the facts

d) A Court cannot make an order either in favour or against a party to

In support of the Preliminary Objection, the Defendant/Applicant filed a one paragraph affidavit, deposed to by Kape Bulus, a litigation secretary in the Defendant's Counsel, Law Firm.

The facts disclosed in the affidavit that I consider relevant to this Preliminary Objection are that the Defendant is aware that Atacheko Louis Taiga who is the subject of this suit is a child, and that Amina Taiga also "a subject" of this suit were not joined as a parties.

In reaction, one Gaiya Stephen, litigation clerk in WestPoint Chambers, Counsel to the Claimant deposed to an eight paragraph counter affidavit dated 18th November, 2019 in opposition to the preliminary objection.

The facts disclosed in the counter affidavit, briefly stated are that this suit is not predicated on the jactition of marriage contrary to the Defendant/Applicant's allegation. It is also asserted that the Defendant

persistently boasted and insists that there was ever a marriage between her and the Claimant.

It is further disclosed that the subject matter of this suit is based on the incessant extortions, harassments, intimidation, threat, and blackmail by of the Defendant. Besides, the Claimant is also aggrieved by the fact that the Defendant is bearing the name "Mrs. Taiga" because of the child – Louis Atacheko Taiga that the Defendant allegedly had for the Claimant.

It is further disclosed that this Court is a Family Court of the High Court of the FCT, consequently, this Court is seized with jurisdiction which is vested on it by the 1999 Constitution of the Federal Republic of Nigeria. Both Counsel filed and exchanged written addresses.

K. A. Achabo Esq., Counsel for the Defendant/Applicant in his written address dated 13th November, 2019 formulated 4 issues for determination as follows;

a) Whether this Honourable Court is properly committed by the Child Rights Act, 2003 can assume jurisdiction for an action relating to Child Rights Act.

b) Whether the Child Atacheko Louis Taiga's constitutionally guaranteed right to fair hearing provided in Section 36(1) of

the Constitution of the Federal Republic of Nigeria 1999 is being violated"?

c) Whether this Honourable Court can great reliefs in the nature of jactification for an action commenced outside the Matrimonial Cause Act or Rules.

d) Whether a Court can validly make an order for or against a party not joined in the suit?

Claimant/Respondent's Counsel, Godswill Mrakpor Esq. in his written address dated 18th November, 2019 formulated three issues for determination as follows;

1. Whether the provisions of the Child Right Act 2003 or any other act of the National Assembly can override the express provision of the Constitutions of the Federal Republic of Nigeria 1999 (As Amended).
2. Whether the facts of the Claimant's case as pleaded in the Statement of Claim discloses a case of jactification of marriage as alleged by the Defendant in her Preliminary Objection?
3. Whether a child must be made a party to proceedings where the question of what the child is to be named is in issue before the question can be effectually adjudicated?

The Defendant/Applicant's Counsel, K. A. Achabo Esq., has submitted that the plank of all the Plaintiff's relief in this suit borders on the interest of a child, Atacheko Louis Taiga. He then drew the attention of this Court to Section 162 of the Child Rights Act, 2003 which provides thus:

"No other Court except the family Court, SHALL exercise jurisdiction in any matter relating to children as are specified in this Act"

This Court's attention was similarly drawn to Section 152(3) of the Child Right Act, 2003 which prescribes the constitution of a Family Court in entertaining matters bordering on the interest of a child which Learned Counsel contends are the reliefs sought in legs 1, 2, 4, 5, 6 an 7 of the Claimant's relief.

Section 152(3) provides thus:

"In any case or matter, the Court may if it thinks it expedient so to do or in a manner prescribed under any enactment or law, call in the aid of one or more assessors specifically qualified and try and hear the cause or matter wholly or partially with the assistance of such assessors"

The Defendant's Counsel also commended this Court to the decision **AYOLA v. OKEDIRAN (2012) ALL F.W.L.R. (PART 614) 126 paras. B – C** where it was held thus:

"The issue as to the constitution of a Court touches on its jurisdiction to hear and determine a matter before it, where a Court is improperly constituted, it lacks the jurisdiction to entertain the matter before it"

In the instant case where the tribunal was improperly constituted, its proceedings were set aside on appeal. This Court was also referred to the celebrated decision in **MADUKOLU v. NKEMDILIM (supra)** that the Court is properly constituted as to numbers and qualifications of members thereof.

Defendant/Applicant's Counsel has urged this Court to apply the reasoning of the Court in the foregoing decision as well as the provisions of Section 153(3) of the Child Rights Act, 2003 or Order 2 Rules 1 and 2 of the Child Rights Act (Enforcement Procedures) Rules 2015 and hold that this suit is incompetent. I find it expedient to refer to Order 1 Rule 2 of the Child Rights Enforcement Rules here, it provides thus:

"The Court at the High Court level shall be duly constituted if it consists of a Judge and two assessors not below the rank of a Chief Child Development Officer, one of whom has attributes of dealing with children and matter relating to children preferably in the area of child psychology education"

I have carefully considered the submissions of Defence Counsel supra and I have carefully examined the provisions of the Child Rights Act as well as the Child Rights Enforcement Rules and I am of the inescapable conclusion that this suit cannot be rendered incompetence on account of the provisions relied upon.

Firstly, it must be noted that Section 152(3) of the Child Rights Act does not mandatorily require the presence of one or more assessors to preside as a panel with the High Court Judge. The provision expressly vests the High Court Judge with the discretion to call in its aid one or more assessors to try and hear the cause or matter wholly or partially before him, in relation to matters relating to a child.

My take is that the constitution of the Panel for purposes of entertaining matters under the Child Right Act will only be necessary in the circumstances where the pending Judge "*thinks it expedient "* to call for the assistance of assessors.

Besides, Order 2 Rule 1 of the Child Rights Act must be read along with Order 5 of the same Rules. It provides thus:

"Where in commencing the proceedings or at any stage in the course of proceeding there appeared a <u>failure to comply with the provisions of these rules</u> in respect of time, place, manner, form or

content or others, the failure may be treated as an irregularity which shall not nullify the respective proceedings, document, Judgment or order.

My view and I so hold from the foregoing provision is that in a situation where the Court is not in compliance with Order 2 by way of composition of the panel prescribed in Order 2 Rule 1, in so far as Order 2(1) is part and parcel of the Child Rights Act, the proceedings by a judge sitting alone in the determination of a matter predicated on the Child Rights Act may only be treated on an irregularity which cannot nullify the proceedings.

In the circumstance, the presiding judge may in the exercise of its discretionary powers dispense with assistance/aid of assessors whenever he '.thinks it expedient" to dispense with their presence, such sitting cannot in my view and I will so hold be rendered incompetent. I also consider the duties of the assessors in a Child Rights Enforcement proceedings pertinent to this application. Section 3(a) of the Child Rights Rules defines an assessor as;

Section 3(a) *"The assessors shall assist in dealing with the matters before the Court in respect of which the assessors have skill and experience.*

(b) Assessors may take such part in the proceedings as the Judge or Magistrate may direct"

I have deliberately reproduced Order 3(a) and (b) of the Child Rights Act in this ruling in order that this Court, will, in determining whether it "think it expedient" to set up a panel comprising of assessors consider whether their presence is necessary having regard to the fact and circumstance of this case.

The case before the Court as I sees it can be effectively and effectually determined without the presence of assessors as I do not think it is expedient to call in aid of the hearing of this suit, the assistance of assessors for the purpose of trying and hearing this cause or matter wholly or partially.

In the light of the foregoing considerations, I am of the view and will so hold that this Court is properly constituted without the attendance of assessors in hearing this matter.

That said, I now turn to the Claimant/Respondent's Counsel, Godswill Mrapkor Esq. first issue for determination.

Learned Counsel has raised the poser on whether the provisions of the Child Rights Act 2003 or any Act of the National Assembly can

override the provisions of the 1999 Constitution of the Federal Republic of Nigeria.

Notwithstanding, this Court's pronouncement on the Defendant/Applicant's issue one, I find it needful to consider the submissions of the Claimant's Counsel on issue one.

G. Mrakpkor Esq. has submitted that only the Family Court is vested with jurisdiction when it is constituted by two assessors and a Judge having regard to Section 162 and 153(3) (though this Court holds a different view).

Learned Counsel for the Claimant drew this Court's attention to Section 152(3) of the Child Right Act which prescribes the constitution of the panel for hearing child rights matters. He also commended this Court to Section 258 of the 1999 Constitution which provides thus:

"The High Court of the Federal Capital Territory Abuja shall only be constituted if it consists of at least one Judge of that Court"

G. Mrakpor Esq. then submitted that there is no argument that only one Judge is constitutionally required to preside over matters in the High Court of the FCT as opposed to Section 152(3) of the Child Rights Act.

This being the same he posits that Section 152(3) of the Child Rights Act is in conflict with Section 258 of the 1999 Constitution.

G. Mrakpor Esq., then commended this Court to the decision in **HON. MINISTER OF JUSTICE & ATTORNEY GENERAL OF THE FEDERATION v. ATTORNEY GENERAL OF LAGOS STATE (2013) ALL F.W.L.R. (PART 704) page 1** where the Apex Court held that:

"Inconsistency is a situation where two or more laws, enactments and/or rules are mutually repugnant or contradictory contrary, the one to the other, so that both stand and the acceptance or establishment of the one implies the abrogation or abandonment of the other. It is thus a situation where two or more enactments cannot function together simultaneously"

Flowing from both provisions, Counsel for the Claimant has rightly raised the poser thus: "Between Section 258 of the Constitution and Section 153(3) of the Child Rights Act, 2003 which of the two statutory provisions should prevail? Based on the principle in the **HON. MINISTER OF LAGOS STATE (supra)** wherein the Court held that: *"The acceptance or establishment of one implies the abrogation or abandonment of the other, both provisions cannot be concurrently applied"*

Mrakpor Esq., in answering this poser, rightly commended this Court to the decision in **AJI v. DANLELE & ORS (2015) L.P.E.L.R. – 40362 (CA) pages 29 – 30, paras. D – E,** it was held as follows;

"When a Court or Tribunal is faced with the choice of obeying the rules of Court and the provisions of the Constitution, without the blink of an eyelid such adjudicating body must follow the commend of the Constitution as opposed to any other rule or law. This at any time will be the justice of the case and no infringement of the right to fair hearing of a party shall arise in view of the fact that any such seeming breach or apparent breach is in a bid to comply with the provisions of the Constitution in the circumstances of the case"

In the same vein and reasoning it was held in **EFCC v. AGBELE (2018) L.P.E.L.R. – 44677 (CA) pages 27 – 34 paras. F – A.**

"From the wordings of Section 1 of the CFRN, the supremacy of the Constitution above all other laws in the country is not in doubt.

The constitution of the Federal Republic of Nigeria is therefore the ground norm and all other legislations are subservient to it. In clear words, all legislations made in respect of the Nigerian Nation, are their existence to the collective will of the people embodied in the extant constitution. It goes without saying that any legislation which is in conflict or inconsistent with the Constitution is null to the extent of the inconsistency. I am not left in doubt that the 1999 Constitution being the ground norm ranks in supremacy to the Child Rights Act as well as the Child Rights Rules"

Still on the competence of Panel comprising of a presiding High Court Judge and two assessors. Mrakpor Esq., amended this Court to the decision in **OMORIEGBE v. OMOTOSHO (1993) N.W.L.R. (PART 270) page386 at 4020 and 409H** where the issue under consideration was the competence (or otherwise) of the determination of appeals comprising of a High Court Judge and two Judges of the Sharia Court. Section 63(1) of the High Court Law, Cap 49, Laws of Northern Nigeria, 1963 was considered in the contact of Section 273 of the 1979 Constitution.

Section 238 of the 1979 Constitution provides thus:

Section 238: "For the purpose of exercising any jurisdiction conferred upon it under this constitution or any law. A High Court of a state shall be duly constituted if it consists of at least one Judge of that Court"

In that case, one Alhaji O. Y. Abdullahi who is not a Judge of that Court but a Kadi of the Sharia Court sat along with the Chief Judge and another Judge of the Court. The proceeding was declared a nullity on the reasoning that it offended against Section 238 of the Constitution.

Section 63(1) provides thus:

"In the exercise of its jurisdiction under Section 62 of the High Court shall be constituted of three members two of whom shall be a

Judges of the High Court and one of whom shall be a judge of the Sharia Court of Appeal"

"The Court held that the High Court Law is an existing law within the meaning assigned to that expression in Section 274 of the 1979 Constitution. But as Section 63(1) is not in conformity with Section 238 of the Constitution. It is of no avail in saving the proceedings of the High Court of Kwara State here concerned. It is invalid as it stands. See ***OLAWOYIN v. COMMISSIONER OF POLICE (1961) N.S.C.C. 90 at 96 – 97 (1961) ALL N.L.R. 213 at 222 – 223, (1961) 1 S.C.N.L.R. 210 at 217 – 218*** *where Breh F.J. delivering the opinion of this Court said the argument against the validity of Section 59(2) of the Northern Region High Court Law (which is on the same terms as Section 63(1) of the High Court Law under consideration) as expressed by Chief Rotimi Williams is as follows;*

Chapter iv of the Constitution Northern Nigeria does not enable anyone but a qualified High Court Judge sit as a member of the High Court, therefore any Law which makes such provision is inconsistent with the Constitution and is to the extent of the inconsistently, void under Section 5 of the Constitution of the Federation, Section 3 of the Nigeria Constitution order in Council, 1960 only saves an existing law if it is in conformity with the Constitution"

I am not left in doubt from the foregoing decision which is substantially in conformity with Section 258 of the 1999 Constitution that a minimum of a High Court Judge of the High Court of the FCT can only sit in its original jurisdiction in hearing matters. More than two Judges of the same High Court may sit but certainly not with the inclusion of assessors when it comes to the hearing and determination of suits generally I am inclined to allude with the submission of Mrakpor Esq. that there is need for a redefinition of the composition of the panel for the hearing and determination of matters under the Child Right Acts under the present constitution, albeit where the presiding judge "thinks" it is expedient to call in assessors for the hearing and trial of matters relating to the child rights act.

I find the illuminating the interpretation accorded to the National Industrial Court Act, 2006 noted by Counsel for the Claimant/Respondent similar to the case at hand, consequently, the same panacea is applicable here. Akaahs JSC in the **SKYE BANK v. IWU (2017) L.P.E.L.R. 42595 SC pages 143 – 146 paras. B – F** reflected thus:

"*In considering the questions posed for consideration and direction of this Court, it is necessary to take a cursory look at the development of the National Industrial Court.*

It was established by the Trade Disputes Decree No. 7 of 1976 Laws of the Federation of Nigeria, 1990. The act provides in Section 20(1):

The Court shall to the exclusion of any other Court have jurisdiction;

a) *To make awards for the purpose of setting dispute and (b) to determine questions as to the interpretation of (i) any collective agreement (ii) any award made by Arbitration Tribunal or by the Court under Part 1 of this Act (iii) The terms of settlement of any trade dispute as recorded in any memorandum under Section 7 of this Act.*

2) It was when the 1979 Constitution was promulgated and superior Court of record were specifically listed leaving out the National Industrial Court of Nigeria that problems started. It become doubtful whether the National Industrial Court of Nigeria was a Court of superior record under that Constitution. This dilemma was resolved in 1992 with the promulgation of decree 47 which made decrees superior to the Constitution.

However with the coming into effect of the 1999 Constitution the dilemma as to the status of the National Industrial Court of Nigeria once

more came into the fore. The National Assembly attempted to resolve the problems faced by the National Industrial Court of Nigeria where it passes the National Industrial Court Act, 2006 and raised it to a superior Court of record with exclusive jurisdiction over issues relating to labour, trade Union and Industrial relations and matters incidental thereto. But in the case of ***N.U.E.E. v. B.P.E. (2010) 7 N.W.L.R. (PART 194) 538*** *this Court held that:*

"That the National Industrial Court of Nigeria was not one of the superior Courts of record listed in Section 6 of the Constitution and that it was inferior to the High Court and consequently the exclusive jurisdiction given to it was unconstitutional"

It was following on this decision that the Constitution was amended by the third Alteration to the 1999 Constitution which recognised the Court as a specialized Court and provided in Section 254(c) the exclusive jurisdiction of the Court over all labour and employment issues"

Flowing from the foregoing reasoning I am inclined to allude with the submission of the Claimant's Counsel that Section 182(3) of the Child Rights Act of 2003 cannot override Section 258 of the Constitution, however as hitherto noted in this Court's ruling on Defendant's first issue, the provision is discretionary to the extent that the judge can

proceed with the hearing of a matter predicated in the Child Rights Act where she “think” that it is not expedient to call in an assessor as in the instant case.

Turning to issue two formulated by the Claimant’s Counsel, that is, whether the Claimant’s case as pleaded in the statement of claim discloses a case of jactition of marriage.

The Claimant/Respondent’s Counsel has submitted that the Claimant’s third relief is tantamount to jactation of marriage hence this suit ought to have been filed by way of a petition pursuant to Section 52 of the Matrimonial Causes Act. Learned Counsel relied on Section 52 of the Act which provides thus:

GROUNDS FOR JACTITION OF MARRIAGE

“A petition under this Act for a decree of jactation of marriage may be based on the ground that the Respondent has falsely boasted and persistently asserted that a marriage has taken place between the Respondent and the petitioner but the making of the decree shall be in the discretion of the Court, notwithstanding anything contained in the Act.

Reliance was also placed on Order xxii (2) (Part 2) Rules 2 and 3 of the Matrimonial Causes Rules which provides that: "A petition for an Act of jactation of marriage shall be in accordance with Form 60"

Still on the prescribed requirements for a petition reference was also made requires thus:

Content of petition (1) A Petition for an Act of jactition of marriage shall state:

a) *The date on which and the times and places at which the Respondent is alleged to have boasted and asserted that a marriage has taken place between the Petitioner and the Respondent and*
b) *Particulars of those boastings and assertions.*

In the light of the foregoing, the statement of claim of the Claimant calls for examination in order to determine whether the requirements Order XXII (22) (Part 2) Rules 2 and 3 of the Matrimonial Causes has been pleaded in this regard this Court has been guided by the reasoning in the case of ***CRUSHED ROCK INDUSTRIES (NIG.) LTD. v. OKEKE (2014) L.P.E.L.R. – 23510 CA pages 12 – 13 paras. E – B*** *per Tine Tur JCA.*

The law is well settled that the statement of claim that is to be scrutinized to determine the issues in controversy between the parties. Only the statement of claim is to be examined in determining whether the Court has jurisdiction"

Guided by the reasoning in the **Crushed Rock Case**, I have examined the Plaintiff's pleadings and note that it is lacking in particulars of boasting and assessors by the Defendant that a marriage took place between her and the Claimant. It is also noted that it is not the Claimant's case that he did not acquiesce to the alleged boastings and assertions. I am inclined to endorse the submission of the Claimant's Counsel that the entire gamut of the 35 paragraph Statement of Claim did not allege that the Defendant/Respondent ever boasted or persistently assert a marital union between her and the Claimant.

In so far as the suit is constituted it does not have the colorations of jactition of marriage, it is needless for this suit to be filed by way of a petition pursuant to the Matrimonial Cause Act.

This Court's answer to Claimant's issue two is in the negative, I hold that the claims does not disclose a case of jactition of marriage. Turning to the Claimant's Counsel's third issue for determination, that is, whether a child must be made a party to this proceedings where the question of the name of the child is in issue.

I have read the submissions of the Claimant's Counsel on this issue, it suffices to say that this point borders on the joinder of parties. It is settled that the non joinder or misjoinder of a party does not render a suit incompetent. Mrakpor Esq. rightly sighted the decision in **CARRENA & ORS. v. AROWOLO & ORS. (2008) 4 N.W.L.R. (PART 447) page 16 paras. E – F** per Taban JCA;

It is settled principle of law that an application by a third party or intervener for joinder can only be granted if the Applicant satisfies the Court that his presence is necessary for the effectual adjudication of the matter.

Similarly in **FC.N. & ORS. v. SHOBU NIG. LTD. & ANOR. (2013) L.P.E.L.R. 21457 (CA) page 21 paras. D – G** it was held:

"It is trite and a common principle of law that a misjoinder or non joinder of a party cannot defeat a cause or mater. It is the law that a misjoinder or non joinder (whatever the case may be of a party will not be fatal to the proceedings.

The Court would deal with the matter in controversy regarding the rights and interest of the parties with the proper parties before it, see ***AYANKOYA v. OLUKOYA (1996) 4 N.W.L.R. (PART 440) 1, CROSS***

RIVERS STATE NEWSPAPERS CORPORATION v.MR. J. L. ONI & ORS. (1995) 1 SC NJ 218"

Apropos to issue 'b' canvassed by the Defendant/Applicant's Counsel on the violation of Atacheko Louis Taiga's right to fair hearing for not being included as a party in this suit. As rightly noted by the Claimant's Counsel the case before the Court is the reference to Atacheko Louis Taiga with the Amina Taiga. The said Atacheko Louis Taiga is at liberty to adopt whatever name he chooses to refer to himself, I am of the view and will so hold that a party who is interested in joining as a party to this suit can freely do so, non joinder of Atacheko in this suit as I see it does not affect the competence of this suit.

On issue c, formulated by the Defendant's Counsel, this Court has already examined the Claimant's pleadings and has held that the Matrimonial Causes Rules is inapplicable in the circumstance, consequently, this Court's answer to issue 'c' is in the affirmative. I hold that this Court can grant the reliefs sought by the Claimant upon reasonable proof by Claimant.

Finally on issue 'd', that is, whether this Court can make an order for or against a party not joined in the suit. I am of the view that the non joinder of a party to a suit cannot affect the competence of a suit. Where the Court is of the view that a party ought to have been joined and has

not been joined the Court will exercise its discretion by ordering joinder of a necessary party.

I am of the view and I will so hold that this suit is competent notwithstanding the non joinder of parties. Should any of the parties find it needful to join an additional party to this Court, the Court will consider such application for joinder on its merit whenever such need arises.

In the light of the foregoing considerations, the Preliminary Objection is hereby overruled and is accordingly dismissed.

O. O. Goodluck
Hon Judge
7th May, 2020

APPEARANCES

Parties absent

Godswill Mrakpor Esq.: For the Claimant

For the Respondent