IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS MONDAY, THE 18TH DAY OF JANUARY, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1996/2018
MOTION NO: GWD/M/202/19

BETWEEN:

HILDA JOSEF …….. PLAINTIFF/RESPONDENT

AND

STEPHEN AMASE ……..DEFENDANT/APPLICANT

RULING

By a motion on notice dated 28th October, 2019 and filed on 20th October, 2019, the Defendant/Applicant prays for the following Reliefs:

1. **An Order of this Honourable Court dismissing this suit for lack of jurisdiction to entertain same since the suit do not disclose any cause of action against the Defendant.**

2. **An Order dismissing this suit for want of jurisdiction against the Defendant since the cause of action is beyond three (3) calendar months, the suit is therefore statute barred against the defendant being a public officer covered by the statute of limitation.**

3. **The Suit is incompetent being a matter of state and communication between officer of state and another in the course of duty.**

4. **The suit is not actionable in the Law of Defamation.**

5. **And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances.**

The application is supported by a 23 paragraphs affidavit and a written address in which four (iv) issues were raised as arising for determination as follows:

i. **Whether having regards to the entire circumstances of this case any cause of action has been disclosed against the Defendant.**

ii. **Whether having regards to the facts and circumstances of this case this Honourable court has the vires to entertain this suit since the cause of action arose beyond three (3) calendar months interval against the Defendant who is a public officer covered by public officers protection Act.**

iii. **Whether having any regards to the entire circumstances and facts of this case the suit is competent being a matter of state and communication between officer of state and another in their course of duty.**

iv. **Nowhere in the entire gamut of the Plaintiff's claim highlighted by Writ of Summons and statement of claim is the suit shown to be actionable in Law of Defamation.**

Submissions were made on all the above issues which forms part of the Record of Court. I will refer to the submission as I consider necessary in resolving the critical issues raised by the application.

In opposition, the plaintiff/respondent file a 6 paragraphs counter-affidavit with two annexures marked as **Exhibits HJ1** and **HJ2.** A written address was equally filed in compliance with the Rules of Court in which two issues were raised as arising for determination to wit:

1. **Whether the Defendant can be regarded as a Public Officer under the relevant laws of the Federal Republic of Nigeria to be entitled to the protection of the Public Officers Protection Act?**

2. **Whether the Defendant enjoys absolute immunity from action arising from defamation of Character?**

Respondents counsel first addressed the issues raised by Applicant before making submissions on the above 2 issues which all form part of the Record of Court. I shall equally make reference to the submissions were necessary in the course of this Ruling.

I have carefully gone through the processes filed by parties on both sides of the aisle together with the oral submissions. In the court's considered opinion, two issues arise for determination:

1. **Whether the writ of summons and statement of claim discloses a reasonable cause of action.**

2. **Whether the relevant provisions of the public officers protection Act avails the defendant in the circumstances.**

The above two (2) issues formulated by court captures the crux of the critical issues raised by the extant application and it is on the basis of these two issues that I would resolve the application by Applicant.

Now a convenient starting point would be to consider first the issues raised relating to the competence of the application. It was contended that the Memorandum of Appearance and statement of defence filed by defendant was out of time without leave and as such that all the processes filed including the extant application are incompetent. It was equally contended that the application is in the nature of a demurrer which is no longer allowed.

On the first point, it seems to me that the fact that the statement of defence was filed out of time does not in any manner hamper or fetter the present challenge to the jurisdiction of the court. The question of jurisdiction on the authorities is a threshold issue and the very basis or lifeline on which a court tries or decides any dispute in court. Where an action is not competent or properly constituted, it robs

the court of jurisdiction to entertain same and must be dealt with first. See **Ofia V Ejem (2006) 11 NWLR (pt.992) 652 at 663.** Because of its importance, it can be raised at any stage of the proceedings and even on appeal and in any manner.

Indeed time does not run against the raising of jurisdiction by a party. See **Galadima V Tambai (2000) 11 NWLR (pt.677) 1. In Nuhu V Ogele (2003) 18 NWLR (pt.852) 231 at 279**, the Supreme Court per Edozie JSC stated instructively as follows:

> ***"It has long been settled that where an objection to the jurisdiction of an inferior court appears on the face of the proceedings and I will add, manifested in the uncontroverted affidavit evidence of the parties, it is immaterial by what means or by whom the court is in formed of such objection. … The issue of jurisdiction being fundamental to the existence of the writ or claim, the form, nature or procedure of how it is raised is not strictly material. Where a challenge to the decision of a court is founded on lack of jurisdiction, the court is bound to consider such challenge. A party to a litigation cannot be shut out and the court inhibited from entertaining a matter on technical ground particularly where the issue of jurisdiction is concerned."***

Accordingly, the alleged failure to file the pleadings of defendant within time has no bearing with the competence of the application. Where a challenge to jurisdiction is posed, the parties need not plead or the defendant peremptorily required to raise the jurisdictional issue in his defence before filing the challenge.

On the issue of demurrer, without doubt, **Order 23 Rule 1 of the High Court Rules 2018** has abolished demurrer proceedings. However the provision of **Order 23 Rule 2 (3) of the High Court Rules 2018** preserve the power of the Court to, at any time, strike out any pleading on the ground, inter alia, that it discloses no reasonable cause of action. It seems to me that this provision of the High Court Rules constitute an alternative to demurrer proceedings. The provision gives wider latitude as to the time when such an application can be made. It is therefore my considered opinion that the Defendant's preliminary objection, though filed before a Statement of Defence has been filed in this action, is not a demurrer. The objection is not incompetent as it is cognisable under the provisions of **Order 23 Rule 2 (3) of the High Court Rules.** I am fortified in this view by the decision of

the Supreme Court in the case of **Mobil Oil (Nig.) Plc V. IAL 316 Inc. (2000) 9 WRN 29 at 39**, where the Supreme Court in considering **Order 31 Rule 19 of the Federal High Court Rules 1976**, which is in pari materia with **Order 23 Rule 2(3) of the High Court Rules** held, per Ayoola, JSC at page 39 of the Report as follows:

> ***"Order 31 Rule 19 of the Rules which enables a party to apply to the Court to strike out any pleadings on the ground, inter alia, that it discloses no cause of action, to some extent, offers an alternative to a demurrer and gives the defendants a somewhat wider latitude as to the time in the proceedings when he could make the application."***

Finally in **NDIC V. CBN (2002) 7 NWLR (pt.766) 272 at 296-297**, the Supreme Court stated thus:

> ***"The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the plaintiff must plead and it is upon that pleadings that the defendant will contend that accepting all the facts pleaded to be true, the plaintiff has no cause of action, or, where appropriate, no locus standi… But as already shown, the issue of jurisdiction is not a matter for demurrer proceedings. It is much more fundamental than that and does not, entirely depend as such on what a plaintiff may plead as facts to prove the reliefs he seeks. What it involves is what will enable the Plaintiff to seek a hearing in court over his grievance, and get it resolved because he is able to show that the court is empowered to entertain the subject matter. It does not always follow that he must plead first in order to raise the issue of Jurisdiction."***

I am therefore unable to agree that the application is incompetent.

Before going to the substance, I note that on both sides of the aisle, averments were made in the affidavits and backed up with submissions on substantive elements of the case. The remit of this simple interlocutory application has been expanded to include matters that the court has no jurisdiction to inquire into at this stage. What is strange here is that on the pleadings of parties on record, facts and issues have

already been joined, so one really wonders at the legal basis of the contentions and conclusions made at this stage.

Whether a case of slander and damages has been made out; whether justification or absolute privilege enures as a defence and many more issues raise certainly cannot be inquired into at the interlocutory level. Issues (3) and (4) raised by Applicant for example is a classic attempt at pre-empting substantive issues. The law is settled that matters for substantive trial cannot be commented on at the interlocutory stage, much less determining the questions at this point.

The court will accordingly refrain from deciding or commenting on any substantive issue(s) or matter. I leave it at that.

Now turning to a consideration of the application on its merits, the simple issue that arises is whether the Statement of Claim discloses a reasonable cause of action. Perhaps I should state at the outset that lack of a cause of action goes to the maintenance of the action and by no means to the legal competence or jurisdiction of the court as erroneously urged by the Defence Counsel. See **Amusan V. Obideyi (2000) 15 WRN 90 at 102**. The case of **Madukolu V Nkemdilim (supra)** is therefore inapplicable.

It is settled law that in deciding whether there is a reasonable cause of action, the determining factor is the Statement of Claim. The court needs only to look at and examine the averments in the statement of claim of the plaintiffs. See **Ajayi V Militiary Admin. Ondo State (1997) 5 NWLR (pt.504) 237; 7up Bottling Co. Ltd V Abiola (2001) 29 WRN 98 at 116**. The facts as contained in the affidavit in support of the application cannot form the basis on which to determine if there is a reasonable cause of action. The answer to the question of whether the statement of claim discloses a reasonable cause of action is to be found in the statement of claim itself and not in any affidavit or other extraneous document.

In considering whether there exists a reasonable cause of action, it is sufficient for a court to hold that a cause of action is reasonable once the statement of claim in a case discloses some cause of action or some question fit to be decided by a Judge notwithstanding that the case is weak or not likely to succeed. The fact that the cause of action is weak or unlikely to succeed is no ground to strike it out. See

A.G. (Fed.) V A.G. Abia State & ors (2001) 40 WRN 1 at 52; Mobil Producing Nig. Unltd V. LASEPA (2003) 1 MJSC 112 at 132.

What then is a cause of action, which has to be reasonable failing which the court would strike out the pleadings? The phrase cause of action has been given different definitions in a plethora of cases by our courts. It is however soothing that the array of definitions bear the same meaning and connotation. See the cases of **Egbe V Adefarasin (1987) 1 NWLR (pt.47) 1 at 20; Omotayo V N.R.C (1992) 7 NWLR (pt.234) 471 at 483; Bello V A.G. Oyo state (1986) 5 NWLR (pt.45) 828.** to mention a few.

In **Akibu V Oduntan (2003) 13 NWLR (pt.685) 446 at 463**, the Supreme Court defined cause of action as:

"A cause of action is defined as the entire set of circumstances giving rise to an enforceable claim. It is in effect the fact or combination of facts which give rise to a right to sue and it consists of two elements:

(a) The wrongful act of the Defendant which gave the Plaintiff his cause of complaint, and

(b) The consequent damage."

The question now is does the extant statement of clear disclose the above elements.

Now in so far as can be evinced from the statement of claim and the reliefs sought, the case of claimant is premised on the tort of slander. Slander in law consists in the publication by the defendant, by means of words spoken of a matter defamatory to the plaintiff.

An action in this situation will lie where the defendant publishes to some person other than the plaintiff false and defamatory matter in reference to the plaintiff in the sence that the defamatory matter disparages the reputation of the plaintiff or tends to lower him in the estimation of right thinking members of the society.

Now on the authorities, it is expected that in formulating this wrongful act of defendant which gave the plaintiff his cause of complaint and the consequent damage, the precise words used must be set out in the statement of claim and the names of the persons to whom they were uttered must be set out in the statement of

claim. Save in exceptional circumstances, the plaintiff will not be allowed to prove at trial publication to any person who is not named or identified in the statement of claim. See the book **Bullen & Leak and Jocobs precedents of pleading at page 634.**

In so far as can be evinced from the statement of claim, the fact or combination of facts on which the plaintiff has premised her right to sue seem to be pleaded in paragraphs 1 to 6 of the statement of claim. The wrongful act of the defendant and the damage allegedly suffered by plaintiff has been clearly set out in the said paragraphs of the statement of claim. It is the alleged false and defamatory statements made as streamlined in paragraph 10 in the presence of certain persons as stated in paragraph 13 which has occasioned reputational damage to plaintiff.

A statement of claim is said to disclose a reasonable cause of action when it sets out the legal right of the Plaintiff and the obligations of the Defendant. It must further set out the action constituting the infraction of the plaintiff's legal right or the failure of the Defendant to fulfill his obligation in such a way that if there is no proper defence, the Plaintiff will succeed in the relief or remedy which he seeks. See **Nwaka V Shell (2003) 3 MJSC 136 at 149, Ibrahim V Osim (1988) 2 NWLR (pt.82) 257 at 271 – 272**.

After a careful consideration of the Statement of Claim, I am satisfied that it has clearly set out the legal rights of the Plaintiff and the obligation of the Defendant. It has further set out the failure of the Defendant to meet its obligations. The Statement of Claim clearly discloses a reasonable cause of action. It discloses questions fit to be decided by a Court. At the risk of prolixity, any perceived weakness of the Plaintiff's case is not a relevant consideration when the question is whether or not the Statement of Claim has disclosed a reasonable cause of action.

The fact that learned defence counsel perceives and had indeed submitted that the plaintiff's action is bound to fail is no ground to strike the action out. No.

The second issue is whether the public officer protection Act avails the defendant in the circumstances.

Now certain enactments stipulate a time limit within which a party who alleges that this civil rights and obligations are stamped on must approach the court for redress. If such a wronged party fails or neglects to institute an action on schedule, as

permitted by that enactment, his suit becomes stale and statute-barred. Such a party is taken to be an indolent who has slept on his violated rights. His allowing grass to grow under his feet or tardiness, in not taking action within the statutory period, makes the court to lose the jurisdiction to entertain his claim. Approving this position of the law in **Ajayi V Military Administrator of Ondo State (1997) 5 NWLR (pt.504) 237 at 254,** the Supreme Court stated:

> ***"The issue whether or not an action has been statute-barred is one touching on jurisdiction of court for once an action has been found to be statute-barred, although a plaintiff may still have his cause of action, his right of action, that is, legal right to prosecute that action has been taken away by statute. In that circumstance, no Court has the jurisdiction to entertain his action."***

One such statute is the public officers protection Act. Section 2 (a) circumscribes the time for initiation of action against a public officer to three months next after the happening of the act, neglect or default complained of or cessation thereof or continuance of damage or injury.

Now on the pleadings where we must take our bearing from, the defendant is said to be a **"principal private secretary of the Governor of Benue State."** There is nothing apart from this description denoting the precise status of the defendant. The question is whether the defendant is even a public officer within the purview of POPA because it is only a public officer who can rely on the provisions of the POPA in a suit against him for any act done by him or any neglect in pursuance of or execution of any law or public duty. **Section 318(1) of the 1999 Constitution** defines **"public service"** of a state and streamlines the services covered under public service.

It is difficult to situate the defendant as a public officer within the purview of the streamlined positions under **Section 318 (1) of the Constitution**. The defendant appears here to be the personal secretary of the Governor who holds office at the pleasure of the Governor. There is nothing to situate fixed tenure neither does the officer have some permanency or continuity. Once the Governor leaves officer, he also leaves with the Governor. Indeed the Governor can relieve him of the position at any time. The position really appears to be one of convenience subject solely to the whims and or dictates of the Governor. It is clear that the defendant is not a

public officer within the provision of **Section 318 (1)**. I find support for this in the case of **Chief John Eze V. Dr. Cosmas I. Okechukwu (1998) 5 NWLR Part 548 page 43 at page 73** where the Court of Appeal stated as follows:

> ***"a Public Officer, in my view is a holder of a Public Office. He is in the public sector of the economy as distinct and separate from the private sector. He is entitled to some remuneration from the public revenue or treasury. He has some authority conferred on him by law. He also has a fixed tenure of office that must have some permanency or continuity. Above all a public officer has the power to exercise some amount of sovereign authority or function of government. The Sovereign authority may be great or enormous, it may be little or small, there should be an element of government function. All the above characteristics must be present to vest a person the status of a public officer. In order words, they must co-exist in person."***

Even if I am wrong in the decision that defendant is not a public officer, **Section 2 (a) of the POPA** gives full protection to all Public Officers or persons engaged in the execution of public duties who at the material time acted within the confines of their public duty. Once they step outside the bounds of their public authority and are acting outside the colour of their office or outside their statutory or constitutional duty, they automatically lose the protection of that law. See **N.I.C V Aminu (2012) 8 NWLR p.330 CA; Sulgrave Holdings Inc. V F.G.N (2012) 17 NWLR (pt.1329) 309; Sani V President FRN (2010) 9NWLR (pt.1198) 153; Garba V Salihu (2001) 8 NWLR (pt.716) 730.**

In this case, the actions of defendant complained of in the pleadings particularly the alleged complaint of criminal malfeasance made by defendant against plaintiff cannot be said to within the scope of his authority in the performance of his duty as a private secretary to the Governor. As stated earlier and at the risk of sounding prolix, once he steps outside the bounds of his office or employment, he loses the protection of the law. In other words, a public officer can be sued outside the limitation period of three months if at all times material to the commission of the act complained of, he was acting outside the colour of his office. This is the situation here. **Section 2 (a) POPA** has no application.

In the light of the foregoing and in summation, I find no merit whatsoever in the Defendant's application and it is hereby dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

1. **Adetola Olulenu, Esq. for the Plaintiff/Respondent.**

2. **C.T. Akighir, Esq. with Esther Uwose for the Defendant/Applicant.**