

**IN THE HIGH COURT OF JUSTICE OF THE F.C.T.**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT APO, ABUJA**  
**ON THURSDAY, THE 7<sup>TH</sup> DAY OF OCTOBER, 2021**  
**BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA**  
**JUDGE**

**SUIT NO: FCT/HC/PET/564/2020**  
**MOTION NO: M/2847/2021**

**BETWEEN:**

**MRS PUNARIMAM FEHINTOLA**

**PETITIONER/APPLICANT**

**AND**

**MR BABATUNDE FEHINTOLA**

**RESPONDENT**

**RULING**

This is a Ruling in respect of an application for temporary custody of children in favour of the Petitioner/Applicant and a restraining order against the Respondent.

By way of an undated Motion on Notice with Motion No. M/2847/2021, filed on the 19<sup>th</sup> of March 2021, the Petitioner/Applicant prays this Honorable Court for the following reliefs:

- 1) *An Order granting temporary custody of the two children to the Applicant pending the hearing and determination of the petition.*
  
- 2) *An Order of perpetual injunction restraining the Respondent, his agents, privies, or whatever names called from further harassing intimidating, threatening and assaulting the Petitioner and the two children.*

In support of the application is a 39-paragraph affidavit deposed to by the Petitioner/Applicant. Annexed to the affidavit are a number of documents collectively marked as **Exhibit A**. The documents are a copy of the Certificate of Marriage, the affidavit of the application for the certificate and the declaration of customary marriage between the parties from the Customary Court of Appeal of the Federal Capital Territory, Abuja, with the Petitioner/Applicant's father, Mr Benjamin Malangwa as the declarant. The Petitioner/Applicant also filed a written address in support of the application which encapsulates the legal argument of the Petitioner/Applicant in support of the application.

The Respondent, on the other hand, did not file any counter-affidavit in opposition to the application. This application, therefore, is considered solely on the facts as contained in the affidavit in support of the application.

In a nutshell, the Petitioner/Applicant claimed the Respondent was a violent person who had no milk of human kindness for her and the children. She further stated that it was the Respondent's viciousness that made her to move out of the matrimonial home. She added that the Respondent had continued to stalk, threaten and harass her even after she had got another apartment. She insisted that the children of the marriage were not spared the Respondent's savagery. She maintained that the Respondent had established a pattern of violence, neglect, abuse, and immorality and,

therefore, it would be in the overall interest of the children that she was given custody of the children.

In the written address which learned Counsel adopted as his oral submission in support of the application, Learned Counsel raised a sole issue for determination, which is: *“Whether the Applicant is entitled to the reliefs sought?”*

In his argument in support of the application, Learned Counsel for the Petitioner/Applicant submitted that the provisions of sections 70, 71, 73 of the Matrimonial Causes Act enabled the Court to grant the reliefs sought in the application. According to Learned Counsel, the Court was empowered to make the orders sought in the application, including the omnibus prayer, having regard to the means, earnings, capacity and conduct of the parties to the marriage.

According to the Learned Counsel, the Petitioner/Applicant had deposed that she was a woman of means who was capable and willing to take good care of her children if granted custody. He also drew the attention of the Court to the fact that the Petitioner/Applicant also had deposed to the conduct of the Respondent. For ease of reference, he referred the Court to all the averments in the Petitioner/Applicant’s affidavit in support, particularly paragraphs 8 – 23 and 25 – 34.

In urging the Court to grant all the reliefs sought by the Petitioner/Applicant, Learned Counsel contended that the children were of tender age and, therefore, required tender care, kind words, and safe home and not a hell where they would be subjected to molestation of any form. He added that the paramount consideration was their overall interest and well-being and nothing more.

I have considered the affidavit in support of the application and the legal submissions of Learned Counsel in urging this Court to grant this application. As I have pointed out earlier, this application is not challenged, since the Respondent did not file any counter-affidavit. It is, however, settled that even where an affidavit is not challenged, the facts contained in the affidavit must be able, on their own, to ground the reliefs sought. The Petitioner/Applicant who seeks to enjoy the judicial grace of this Court must establish to the satisfaction of this Court that she is entitled to the reliefs which she seeks this Honourable Court to dispense.

In ***Ogojeifo v. Ogojeifo (2006) LPELR-2308 (SC)***, the Supreme Court held that ***“...It is also the law that the unchallenged and uncontroverted facts deemed admitted in the affidavit must be capable of proving and supporting the case of the appellant as the applicant. In other words, the evidence contained in the unchallenged affidavit must be cogent and strong enough to sustain the case of the applicant.”***

With these prefatory remarks, I would, therefore, in determining this application, adopt and reframe the issue formulated by the Petitioner/Applicant in her written address, to wit: *“Whether from the facts contained in the affidavit in support of the application and the general circumstances of this case, the Petitioner/Applicant is not entitled to the reliefs sought in the application.”*

The Petitioner/Applicant in her affidavit deposed to facts which, ordinarily, would make the Respondent unworthy of the custody, notwithstanding the fact that he is the father of the children. I am also not unaware of the provisions of sections 70(1) and (2) and 71(1) of the Matrimonial Causes Act which deal with custody and maintenance of children of a marriage. Indeed, while section 70 gives the Court the power to make interlocutory orders relating to a party to a marriage, or children of a marriage whether or not the proceedings relate to maintenance of a party to a marriage or children of a marriage, section 71(1) enjoins the Court to accord paramount consideration to the interest of the children in proceedings of this nature.

In view of this therefore, the same section allows the Court to make such orders as it thinks proper. Thus, like all interlocutory orders, the grant of reliefs of this nature falls within the discretionary powers of the Court. In exercising these powers, the Court is always obligated to exercise same judicially and judiciously. In ***Owerri Municipal Council & Ors. v. Onuoha &***

***Ors (2009) LPELR-8422(CA), the Court of Appeal held that “An order of interlocutory injunction is granted upon exercise of discretionary power of the Judge in his equitable jurisdiction. Like with all other discretions, the Judge must act judicially and judiciously on the facts placed before him.”***

It is clearly evident, therefore, that the Court has wide powers when it comes to the issue of custody of children in matrimonial causes. These powers include the power to grant or not to grant the reliefs sought in relation thereto even at the interlocutory stage pending the final disposal of the substantive suit. The major consideration behind these provisions, is the need to safeguard the interest of the children of the marriage at all stages of the proceedings and thereafter.

The question that remains is whether the Petitioner/Applicant has been able to convince this Court that she is entitled to the reliefs sought in this application. In other words, are the facts as presented in the affidavit in support of the application cogent and compelling to enable this Court exercise its discretion in favour of the Petitioner/Applicant?

I have scrutinized the said affidavit. I am of the firm belief that though unchallenged, the affidavit leaves certain questions unanswered. For instance, the Petitioner/Applicant stated in paragraph 20 of her affidavit that the children live with the Respondent, but she did not tell the Court how the

children come into the custody of the Respondent. In paragraph 3.4 of the written address, it was contended on behalf of the Petitioner/Applicant that the children were of tender age; but nowhere in the affidavit were the dates of birth of the children stated. How old are the children? These and other questions agitate the mind of this Honourable Court.

To answer these questions, and do substantial justice to all the parties before it, this Court has a duty to look into all processes filed in the matter in order to extract information that it believes will assist it in arriving at a just and equitable resolution of the issue formulated herein. Besides, this is well within the powers of the Court to so do. In the case of ***Nigerian German Chemicals Plc v. Ali Ray Maritime Services Ltd (2018) LPELR – 50856***, The Court of Appeal per Yakubu JCA held that ***“The law remains well settled to the effect that the court has the obligatory duty to consider all processes filed before it, before it reaches a decision on a matter placed before it for determination between the parties.”***In ***Matahor & Anor v. Ibarakunye (2017) LPELR 43346 (CA)***, the Court of Appeal per Oniyangi JCA held that ***“It is within the Court competence to look at all processes filed in a matter.”***See also ***Ikpeazu v. Otti & Ors (2016) LPELR-4005 (SC)***.

In view of the foregoing, therefore, I am compelled, in the absence of a counter-affidavit, to look into the processes filed in respect of this petition in my quest to address the questions the affidavit of the Petitioner/Applicant

raised. It is my considered view and I so hold that, after a careful review of the facts contained in the Petition on the one hand, and the facts contained in the Answer to the Petition and the Cross-Petition on the other hand, it will be most apposite to order the parties to maintain *status quo ante bellum* pending the hearing and determination of the petition for a decree of dissolution of the marriage between the Petitioner and the Respondent.

From the processes already filed in respect of the petition, there is no doubt that the parties no longer live together. There is also no uncertainty as to the particular parent the children have been living with since parties started living separately. Though the Petitioner/Applicant claimed that the children are with the Respondent, she has not adduced any evidence to establish that the Respondent has denied her access to the children. Though she also stated that the children were of tender age, it must be stated that the expression “tender age” is a vague and relative term and its proper definition can be construed according to the context it is being used. Suffice it to say here that the children in question are in their teens. Are they, therefore, for the purpose of this application, of “tender age”? Though this Court may not agree with the Petitioner/Applicant that the children are of “tender age” since they are already in their teens, I must state here that they are at the most impressionable stages of their lives and, therefore, most vulnerable. They need all the protection and guidance they can get. Fortuitously, however, the



children are in boarding schools, thereby obviating the urgency for an order of temporary custody.

I am not unaware of the plethora of judicial authorities such as ***Williams v. Williams (1987) 2 NWLR (Pt. 54) 66 per Karibi-White, JSC; Odogwu v. Odogwu (1992) LPELR-2229 (SC), Tabansi v. Tabansi (2009) 12 NWLR (Pt. 1155) and Adeseke v. Adeseke (2020) LCN/14108 (CA)*** among others regarding custody of children. It is my considered view, however, and I so hold, that the interest of justice will be served if the *status quo ante bellum* is maintained pending the determination of the petition. This is necessary to avoid disrupting the lives of the children if they were ordered to live with one parent in one breath and in another breath, ordered to live with another. The disruption associated with frequent change in demography and environment will not have a salutary effect on the proper development of the children. Moreover, the reliefs sought in this interlocutory application are identical to some of the reliefs sought in the substantive suit. The Courts have always been careful in situations like this so that they do not, in granting interlocutory reliefs, resolve the issues in the substantive suit in the process. See, for instance, ***Achebe v. Mbanefo (2017) LPELR-41886(CA) per Tur, JCA.***

On the other hand, there is the need for parties to maintain the peace pending the hearing and determination of this petition. To this end, therefore, all the parties are hereby restrained from coming within a contiguous

proximity of each other's residences and place of work. Specifically, the Respondent is hereby restrained from stalking, harassing, threatening or in any way abusing the Petitioner/Applicant pending the hearing and determination of this petition. Similarly, the Petitioner/Applicant is hereby restrained from stalking or in any way visiting the Respondent either at his residence or place of work pending the determination of this petition except directed otherwise by the Court.

In view of the foregoing, and for all the reasons aforementioned, I hereby order as follows:-

- 1) AN ORDER granting temporary custody of the two children to the Petitioner/Applicant pending the hearing and determination of the petition is hereby refused. All parties are hereby enjoined to maintain the *status quo ante bellum* pending the hearing and determination of the petition.**
  
- 2) AN ORDER is hereby made restraining all the parties from coming within a contiguous proximity of each other's residences and places of work. Specifically, the Respondent is hereby restrained from stalking, harassing, threatening or in any way abusing the Petitioner/Applicant pending the hearing and determination of this petition. Similarly, the Petitioner/Applicant is hereby restrained from stalking or in any way visiting the Respondent either at his**

**residence or place of work pending the determination of this petition except directed otherwise by the Court.**

This is the Ruling of this Court delivered today, the 07<sup>th</sup> day of October, 2021.

**HON. JUSTICE A. H. MUSA  
JUDGE  
07/10/2021**