

**THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT APO**

**THIS MONDAY THE 22<sup>ND</sup> DAY OF NOVEMBER, 2021**

**BEFORE: HON. JUSTICE JUDE O. ONWUEGBUZIE**

**COURT 33 APO**

**SUIT NO: FCT/HC//CV/573/2021**

**RULING**

**BETWEEN:**

MUHAMMED CHIBADO ABUBAKAR..... CLAIMANT/RESPONDENT

AND

ZENITH BANK PLC-----DEFENDANT/APPLICANT

By a Notice of Preliminary Objection dated 7<sup>th</sup> September, 2021 and filed on 8<sup>th</sup> day of September, 2021, brought pursuant to Order 2 Rule 1, 2 (1) a (i) & (ii), b & c; (2) (a) (b)(c)(d)(e); (3);(4);(5) Rule 3(1), (2) and (3) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018, and Under the Inherent Jurisdiction of this court.

The applicant prays for the following orders:

AN ORDER of the Honourable Court Striking out this Suit No.

CV/573/2021, for being incompetent and owing to the consequential

lack of Jurisdiction by this Honourable Court to entertain, adjudicate on and determine same.

Grounds for this Objection are:

#### GROUND ONE

The above Suit No. CV/573/2021 is grossly Incompetent being contentious and having brought vide Originating Summons.

Particulars of the Ground One

- i. Order 2 Rule 1 of the High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2018 provides for four procedures through which civil proceedings may be begun in court, viz: writ, originating Summons, originating motions or suit.
- ii. Rule 2 (1) a (i) & (ii), (iii), b & c stipulates the claims which can be brought through writ, to wit: Any relief or remedy for civil wrong or damages for breach of duty, whether contractual, statutory or otherwise, where the claim is based on or includes an allegation of fraud or where an interested person claims a declaration.
- iii. Rule 2 (2) (a)-(e) stipulates the documents that writ of summons shall be accompanied with, to wit: Statement of Claim, List of Witness(es) to be called at the trial, Written Statement on Oath of witnesses, copies of every document to be relied on at the trial and Certificate of Pretrial Counseling.
- iv. Rule 3 (1) and (2) prescribes the types of cases that can be validly brought vide Originating Summons.
- v. In the instant suit, the Claimant's purported claims are based on allegedly breach of duty he is owed by the Defendant and there is

an allegation of fraud. What is more, the Claimant seeks for five declarations.

- vi. The Claimant's Affidavit are also rife with contentious facts in respect of which he and the Defendant are not *ad idem*. In its Counter Affidavit, the Defendant has vehemently denied and controverted the depositions contained in the Claimant's Affidavit.
- vii. Again the suit does not entail the interpretation of any contractual or statutory instrument on the basics of non-contentious facts.
- viii. Therefore, the suit ought to have been brought vide writ of summons and not Originating Summons.

## GROUND TWO

This Honourable Court is by virtue of the said Incompetence of suit No. CV/573/2021 divested of the requisite Jurisdiction to entertain and adjudicate on the suit.

### Particulars of Ground Two

The non-compliance by the Claimant with the said mandatory provisions of the said High Court of the Federal Capital Territory, Abuja Civil Procedures Rules 2018 is fatal and has rendered the instant Suit No. CV/573/2021 grossly Incompetent and unavailable for adjudication and determination.

The Notice of Preliminary Objection is supported by a 5 paragraphs Affidavit deposed to by one Kelechi Mbakwem staff of the Defendant in this suit. In support of the Motion is a Written Address in compliance with the Rules of this Honorable Court.

The cruse of the Defendant/Applicant application is that it has comprehensively denied and controverted the depositions contained in the Claimant/Respondent's

Affidavit that it is rife with falsehoods. That this case does not entail the interpretation of any contractual or statutory instrument.

In its written Address, the Defendant/Applicant Counsel formulated three (3) Issues for the determination of this Honourable Court. Vix:

- a. Whether bringing the instant Suit No. CV/573/2021 to this Honourable Court vide Originating Summons has rendered this suit incompetent.
- b. Whether if it is determined that the suit is incompetent, this Honourable Court has by virtue of the said incompetence, been divested of the Jurisdiction to entertain, adjudicate on and determine same.
- c. Whether the Suit ought to be struck out for lack of competence and jurisdiction.

In the Counsel's argument on issue (a) he submitted that Suit No: CV/573/2021 is incompetent having been erroneously brought through Originating Summons instead of Writ of Summons. That having regard to the provisions of **Order 2 Rule 1, 2 (1) a (i) & (ii), b & c; (2) (a) (b)(c)(d)(e)** and having regard to the Claims of the Claimant, this case ought to have been brought through Writ of Summons rather than Origination Summons, more so as both parties are not *ad idem* on the facts which renders the case highly contentious. Besides, the claims of the Claimant do not depend upon a questions of the construction of an enactment, a deed, will or other written instrument as envisaged in **Rule 3(1) and (2) of the Order 2 of the High Court the Federal Capital Territory (Civil Procedure) Rules Abuja 2018**. He further submitted that bringing a suit through the appropriate laid down procedure is a *sine qua non* condition precedent to the adjudication of any suit. That it is trite law that where a statutory provision of a statute is clear an unambiguous effect must be given to it. He relied **GROSVENOR CASINOS LTD V. HALAUOI (2009) 38 NSCQR, PAGE 187, AT PAGE 21; ADEBAYO V. GOVERNING BOARD, RUGIOLY ONDO**

**(2017) A NWLR (PT.1555) pg. 264 @ 285-286, para. H-B. and COMMISSIONER FOR EDUCATION V. AMADI (2015) EJSC (VOL.8) page 185 @199-200, para H-B.**

He submitted that in **LAWAL V. OKE (2001) 7 NWLR (Pt. 711) pg. 88** where the Court held:

**“Once the Defendant raises objection as to the non-compliance with a condition precedent to the exercise of the Court’s jurisdiction, it is for the Court seized of the proceedings to examine the objection to ascertain whether it can adjudicate...the court cannot side-track that objection.”**

That in **MAINSTREET BANK CAPITAL LTD V. NIG. RE (2018) 14 NWLR; (PT.1640)**, where the Supreme Court held

**“There are situations where a statute ... sets out conditions for the activation or invocation of a Court’s jurisdiction. In such cases, a plaintiff’s failure to follow the statutory conditions or procedure and steps will deny the court’s competence to proceed in the proceeding”**

The Defendant/Applicant further submitted that concerning Originating Summons adopted by the Claimant/Respondent in this suit, that the Supreme Court further held at pages 449-450 thus:

**“The originating summons procedure is meant to be invoked where the parties are substantially ad idem on the facts and without of pleadings, merely want, for example, a directive of the Court on the point of law invoked. Where there is likely to be substantial dispute of facts relevant to the issue in controversy,**

**the originating procedure is not appropriate. In this case, the issue in contention are beyond mere interpretation of the agreements between the parties. Thus, contrary to the appellant’s argument, the Court of Appeal rightly held that the proceeding before the trial Court was contentious and not suitable for determination upon an originating summons.”**

The Counsel urged the court to invoke the provisions of **Order 2 Rule 1, 2 (1) a (i) & (ii), b & c; (2) (a) (b)(c)(d)(e); (3);(4);(5) Rule 3(1), (2) and (3) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018** and hold that the instant suit was instituted through a wrong procedure in clear violation of the said provisions and that the suit is *ipso facto* incompetent.

The Defendant/Applicant Counsel submitted on issue (b) that it is trite that where a case is brought through an unlawful process and is incompetent the Court will be divested of the jurisdiction to entertain and adjudicate on the case. He cited **NKEMDILIM V. MADUKOLU (1962) 2 SCNLR pg. 341; JOSEPH UZOR & ANOTHER V. DAEWOO (NIG) LTD (2019) 10 NWLR (PT. 1680) pg 207 @ 223-224. Para. H-A; EFFIOM V. STATE (supra) @ pg 242; ADO V. STATE (2017) 15 NWLR (PT. 1587), pg 65 @ 77, para. F-H and C.B.N V. UBANA (2017) 15 NWLR, (Pt. 1587) p. 151 @ 167 para E-F.**

The Defendant/Applicant Counsel finally submitted on issue (c) that the effect of lack of competent and jurisdiction in a case before the court is striking out of the case. He cited **C.B.N V. UBANA (supra) where the Court held thus:**

**“Once a court lacks jurisdiction, a party cannot use any statutory provision or common law principles to impose it because absence of jurisdiction is irreparable in law. The matter ends there and the only procedural duty of the Court is to strike out the matter.”**

The Counsel concluded by urging this Court to strike out the case for lack of competence and jurisdiction.

The Claimant/Respondent on the other hand responded by way of Address in Opposition to the Defendant/Applicant Preliminary Objection. The Claimant Counsel formulated a lone issue for the determination of this honourable court:

Whether against the background of the facts of this case, the relevant provisions of the Rules of this honourable court as interpreted by the long line of judicial decisions of the apex court, this suit is not rightly commenced by Originating Summons.

In his argument the Counsel submitted that over the years our appellate courts have interpreted the various provisions of mode of commencement of actions including by Originating Summons and have concluded that save where there are likely to be substantial disputes of facts, Originating Summons is the most appropriate mode to commence actions in which as in this case, that the Claimant is only asking for declaration of his right under the banker-customer contractual relationship interparty.

That in any event, the Defendant's objection being procedural in nature after taking step of filing its Counter-affidavit in opposition to the substantive originating summons is doomed and dead on arrival. That the Defendant having taken step of filing its counter affidavit to the main originating summons is estopped from raising any issue of defect and is deemed to have waived its right. He cited the case of **ANYANWOKO V. OKOYE (2010) 5 NWLR (PT.1188) p. 497 @ 516 para D-F** or R where Justice Tabai, JSC posited that:

**“As I have earlier on in this judgment of the court to hear and determine the suit remains intact notwithstanding the breaches of Order 6 of the Rules. The noncompliance complained of are**

**merely breaches of procedure rules. An application to set aside a suit for irregularities shall not be allowed unless it is made within a reasonable time before the applicant takes any fresh steps after noticing the irregularities. This is the purport of the provisions of Order 2 Rule 2 (1) of the High Court of the Federal Capital Territory Civil Procedure Rules. In other words, where a party has become aware of the none compliance or where a writ is defective, he should apply for striking out of same before taking any further steps in the proceedings. Otherwise he will be estopped from raising the issue of defect in the instant case, the steps taken by the appellants in filing a counter affidavit and a further affidavit after becoming aware of the irregularity complained of amounted to a waiver of her rights to complain about the defect in the originating summons”**

The Claimant/Respondent Counsel submitted that in any event the Claimant has not even conceded that the choice of originating summons in bring this action is defective or inappropriate. That it is trite originating summons is an appropriate mode of commencement of a suit where the cause entails interpretation of law or construction of documents or involves unsubstantial dispute of facts. He cited the case of **FAMFA OIL LTD V. A.G (FEDERATION) (2003) 18 NWLR (PT. 852) p. 453-** where the Supreme Court held at p. 467 thus:

**“The very nature of an originating summons is to make simple for hearing ...It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to their existence in the pleadings of the parties to the suit. In such situation, there is no serious dispute as facts but what the Plaintiff is claiming is declaration of his rights”**



The Counsel submitted further that Order 2 Rule 3(1) of the Rules of this Court provides thus:

**“any person claiming to be interested under a deed, will, enactment or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instruction and for a declaration of the rights of the person interested”**

The Counsel submitted that in the instant case, the issue as borne out of the Claimant’s claim are purely documentary and call for the construction of Banker-Customer contract, printed debit alerts received from the Defendant of the unauthorized transfers from the Claimant’s account in the total sum of #1,704,000, printed credit alerts of refund of the said fraudulent debit sum of #1,704,000 from the Defendant, the Claimant’s letter not responded to by the Defendant, which in law amounted to admission. The counsel cited the cases of **JEV v. IYORTYOM (2014) 14 NWLR (PT. 1428) p. 575 @ 627-628** and **HABIB (NIG) LTD v. OCHETE (2001) 3 NWLR (PT. 699) p. 114 @ 135**

Submitting further the Counsel said in the same breath and at the risk of repetition, that though the Court can, in deserving cases, order pleadings to resolve conflicts in affidavit in Originating Summons, it is not the law to strike out the suit and will not even order pleadings where there are documents annexed to the affidavit which can be effectively used to resolve the conflict, as exist in the instant case. The Counsel relied on the case of **JEV. V. IYORTYOM (supra)p. 575 @ 591 R. 14**. Where per OKORO JSC postulates thus:

**“where the proceeding are hostile, originating summons should not be used. The general principle of law regarding conflict in affidavit in an originating summons procedure is that where that is the case, the court should order pleadings in order for the**

**parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of parties which can be effectively used to resolve the conflicts, there would be no need to order pleadings.”**

The Counsel finally submitted that the Defendant failed to refer the Honourable Court to any substantial or real dispute of fact against the backdrop of the documentary facts on which the Claimant’s cause is predicted to justify their misconceived objection against the mode of commencement of this suit; necessitating a further re-appraisal of the contentions of the objector hereunder. That in the written address in support of the preliminary objection, the Defendant contends that the Claimant’s suit is incompetent having been erroneously brought vide Originating Summons instead of writ having regards or as the Defendant puts it , ‘...moreso as both are not add idem on the facts which renders the case highly contentious’ besides, the Defendant also contends that the claims of the claimant do not depend upon any question of construction of an enactment, a deed, will or any other written instrument as envisaged in Rule 3(1) and (2) of Order 2 of the Rules of the Court 2018. That the Defendant misconceived rules of court as statutory provisions and elevated the former to the later and relying on inapplicable Apex Court decisions submitted that where a statutory provision of a statute is clear and unambiguous, effect must be given to it. He cited the case of **DUKE V. AKPABUYO LG (2005) 19 NWLR (PT.959) p. 130 @ 142-143 para. G-A** where Pats-Acholonu, JSC posited on the statute and nature of Rules of Court thus:

**“It is important to understand the nature of Rules of Court. Our courts have held that Rules of Court are meant to be obeyed. They provide support in the administration of justice, but it must be understood that being rules or regulations to assist the court in**

**its efforts to determine issues and controversies before the courts, care must be exercised in not elevating them to the status of a statute as they are subsidiary instruments. They are to be used by the court to discover justice and not to choke, throttle or asphyxiate justice. They are not sine qua non in the just determination of a case and therefore not immutable”.**

The Claimant/Respondent Counsel submitted the contrary to the submission of the Defendant/Applicant Counsel, parties do not have to be ad idem on facts before a matter can be commenced by Originating Summons provided there are no substantial disputes as to facts. He cited **FAMFA OIL LTD v. AG (FEDERATION)** (supra) that Claimant’s claims are premised on construction of written instruments of banker-customer contractual relationship as captured above in para.2.4 and 2.5 of his written address. He urged the court to discountenance the preliminary objection as being misconceived, frivolous and intended to waste the time of the court.

Lastly, the Defendant/Respondent’s Counsel replied on points of law to the Claimant/Respondent’s Address. The Counsel submitted that it is obvious from the depositions in the Claimant’s Affidavit and Defendant’s Counter Affidavit that both Affidavits and parties are in conflict as to the facts. That therefore, the Originating Summons procedure adopted by the Claimant is obviously inappropriate and has rendered the suit incompetent which incompetence has divested this Honourable Courts of the jurisdiction to entertain same. He cited the case of **NJIDEKA EZEIGWE V. CHIEF SIR BENSON CHUKS NAWAWULU & 2 ORS (2010) 2 S.C.J. p. 112 @ 156**, where the Supreme Court held:

**“Originating Summons Procedure is appropriate where there is no substantial dispute of facts between the parties or the likelihood of such dispute.”**

The Counsel submitted that the issue of competence of a suit and the jurisdiction of the Court to entertain same are very fundamental and can be raised at any time. They can be raised before or after filing Counter Affidavit. They can even be raised after judgment or during appeal even at the Supreme Court. He cited the case of **NASIR V. CIVIL SERVICE (2010) 2 S.C. N.J p. 184 @ 195.**

He submitted further that issues of competence and jurisdiction are not mere irregularities or defect which can be waived. He relied on the case of **KENT V. ISHAKU (2017) 15 NWLR, (PT. 1587) p. 94 @ 118** where the Supreme Court held:

**“Failure to commence a suit or appeal with a valid Originating Process is a fundamental error. It goes to the root of the action or appeal, since the condition precedent for the exercise of the Court’s Jurisdiction would not have been met to place the suit or appeal before the Court for the exercise of its jurisdiction to hear and determine the issues in the action or appeal.”**

The Defendant/Applicant Counsel finally submitted that the arguments, submissions and cited case law in paragraphs 3.1 and 3.2 of the Claimants/Respondent’s Counter Affidavit are thoroughly flawed, misconceived and misapplied. That it is trite that Rules of Court are not made for the fun of it and must be obeyed. Insistence on their obedience does not amount to elevating Rules of Court to the Status of a statute. He cited **UMEZINNE V. AG FED. (2019) 11 NWLR, (PT.1683) p. 358 @ 374, para. B-C; KENTE V. ISHAKU (supra) @ p.118-119 para.G-A and OBARO V. HASSAN (2015) EJSC (Vol.8), p.126 @ 156, para F-G.** and urged this Court to strike out the Counter Affidavit for want of competence and jurisdiction and uphold their preliminary objection.

I have carefully weighed the submissions of learned Counsel for the contending parties. The fundamental issue that calls for determination is whether or not, given the facts of this case and reliefs sought as set out in the Respondents Originating Summons the action was properly commenced vide originating summons procedure.

The foregoing provisions of **Order 2 Rule 1, 2 (1) a (i) & (ii), b & c; (2) (a) (b)(c)(d)(e); (3);(4);(5) Rule 3(1), (2) and (3) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018** are self-explanatory. To determine whether or not the Claimant/Respondent's suit was validly commenced in the light of the above provisions, I have examined the questions raised for determination in the Originating Summons and averments in the affidavit in support of it. The questions raised for determination by the Court summarized, is:

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Whether this Suit ought to be struck out for lack of competence and jurisdiction.

I quite agree with the learned Counsel to the Defendant/Applicant submission that this suit ought not to be brought vide Originating Summons. Having regard to the provisions of **Order 2 Rule 1, 2 (1) a (i) & (ii), b & c; (2) (a) (b)(c)(d)(e)** and having regard to the Claims of the Claimant, this case ought to have been brought through Writ of Summons rather than Origination Summons, more so as both parties are not *ad idem* on the facts which renders the case highly contentious. Besides, the claims of the Claimant do not depend upon questions of the construction of an enactment, a deed, will or other written instrument as envisaged **in Rule 3(1) and (2) of the Order 2 of the High Court the Federal Capital Territory (Civil Procedure) Rules Abuja 2018**. So I am of a firm view that facts on how these moneys deposited in paragraphs 3 (i), (ii) & (iii), (iv) (v); 13 and 15 of

the Claimant's Affidavit in Support of the Originating Summons were illegally transferred from the Claimant account by the Defendant are substantial disputes of facts hence need to be proved by oral evidence. I am therefore of the view that this action ought not be commenced by way of Originating Summons and I so hold.

The law is trite that, Originating Summons are used for non-contentious actions, where therefore there is likely to be substantial disputes of facts or where the relief(s) sought by the Claimant is/are declaratory in nature, Originating Summons procedure that admits only affidavit evidence would not be employed. In such a situation, the action must be commenced by Writ of Summons, the facts being in very serious disputes. See the case of **AKINSETE V. AKINDUTIRE (1966) 1 All NLR p. 14; MABAMIJE V. OTTO (2016) lpelr-26058 (SC) and EZE V. UNIJOS (2017) LPELR-42345(SC).**

Albeit, the law is also settled that, it is not in all cases where there is conflicting affidavit evidence that Originating Summons cannot be employed, where there exist documentary evidence upon which the court may ground its decision, the action may be heard and determine on such evidence. See the case of **FALOBI V. FALOBI (1976) LPELR-1236(SC); NWOSU V. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (1990) 2 NWLR (Pt.135) p.688**

However, the Court can, in deserving cases, order pleadings to resolve conflicts in affidavit in Originating Summons, it is not the law to strike out the suit only because it was commenced vide Originating Summons instead of Writ of Summons and will not even order pleadings where there are documents annexed to the affidavit which can be effectively used to resolve the conflict. See the case of **JEV. V. IYORTYOM (supra) p. 575 @ 591 R. 14.** Where per OKORO JSC postulates thus:

**“where the proceeding are hostile, originating summons should not be used. The general principle of law regarding conflict in affidavit in an originating summons procedure is that where that is the case, the court should order pleadings in order for the parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of parties which can be effectively used to resolve the conflicts, there would be no need to order pleadings.”**

In the case of **OOKANOLA V. GOVERNMENT OF OSUN STATE & ANOR. (2020) LCN/15291 (CA)** where the Court of Appeal held:

**“The power of the Court to strike out an action not initiated by due process of law does not apply to a situation where an action which ought to have been commenced by Writ of Summons was commenced by Originating Summons. The law remains that, where the court comes to the conclusion that an action ought not to have been commenced by Originating Summons, the Court should proceed to order pleadings to be filed and exchanged by the parties and not strike out the action.”**

But in final summation, this Honourable Court has jurisdiction to entertain this suit, therefore, this suit is not incompetent, the application to strike it out is hereby refused and I so hold.

To this end I hereby order the parties to file pleading and exchange same. The Claimant is hereby given 14 days to file and serve pleading to the Defendant while the Defendant has same 14 days to file and serve same to the Claimant. Then the Claimants has 7 days to file reply if any.

This case is hereby adjourned to the ..... day of .....2022 for hearing.

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**Hon. Justice Jude O. Onwuegbuzie**