

**IN THE HIGH COURT OF JUSTICE OF THE
CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 6

SUIT NO: FCT/HC/PET/104/2019

BETWEEN:

SHOLA PRINCE ETUWEWE.....PETITIONER

VS

THELMA OGHENEKEVWE ETUWEWE.....RESPONDENT

RULING

By a Motion on Notice dated 22/3/2022 but filed on 23/3/2022, with Motion No. M/3673/2022, brought pursuant to Order 43 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018, Section 1 and 14(1) (2) of the Child Rights Act, Section 36 of the 1999 Constitution (As Amended) and under the inherent jurisdiction of this Honourable Court, the Applicant prays the Court for the following reliefs;

- (1) An Order of this Honourable Court directing the Respondent to produce the only child of the marriage, Oritsemoyowa Daniella Etuwewe, wherever she may be on the next adjournment date to enable the Petitioner to see her, having not seen nor heard from her for over two years at the behest of the Respondent.

- (2) An Order of this Honourable Court directing the Respondent or any other person in the position to do so to grant the Petitioner/Applicant access to the child at reasonable times as the need may arise pending the determination of this suit.
- (3) An Order Restraining the Respondent or her privies from taking the only child of the marriage out of the Federal Republic of Nigeria without the knowledge and consent of the Petitioner pending the determination of this suit.
- (4) And the Omnibus reliefs.

In support of the Motion is 9 Paragraph Affidavit sworn to by one Jessica Nnamania Legal Secretary in Law Firm of Petitioner/Applicant's Counsel. Also filed a Written Address and adopts same as oral argument in urging court to grant the prayers.

Opposing the Motion, Respondent's Counsel filed a 17 Paragraph Counter-Affidavit with one Exhibit attached marked Exhibit "A" deposed to by one J.O. Yakubu a Legal Practitioner in the Law Firm of Respondent's Counsel. Also filed a Written Address and adopts same in urging the court to refuse the application.

In the Written Address of Petitioner/Applicant settled by Obinna Val Ezemba Esq. a sole issue was submitted for determination that is;

"Whether in the circumstances of this case, the Applicant is entitled to the reliefs sought in its application?"

And submits that an Interlocutory application of this nature can be brought to court pending the determination of the Petition. Refer to Order XIV Rule 22 (1) of the Matrimonial Causes Rule and the case of Nwosu Vs Nwosu (2012) 8 NWLR (PT. 1301) 1. And the court has the discretionary powers to grant the application. Refer to Nzeribe Dave Eng. Co. Ltd (1994) 8 NWLR and Kigo (Nig) Ltd Vs Holman Bros (Nig) Ltd (1980) 5-7 SC. 60. Therefore court can hear and grant the application as prayed. Refer to Williams Vs Williams (1987) 2 NWLR (PT. 54) 66.

Submits further that granting the reliefs will preserve the issue of custody of the child of the marriage which is being threatened pending the determination of the suit and which forms part of the Claims/reliefs in the Petition. Urge court to consider the competing rights of both parties in determining the application. Refer to the case of Kotoye Vs Saraki (1995) 5 NWLR (PT. 395).

Finally submits that the Applicant have satisfied the court with the requirement for the grant of the application going by the pronouncement in the cases cited, therefore urge court to exercise its discretion in favour of Applicant in the interest of Justice.

In the same vein, Respondent's Counsel by I. I. Damisa Esq. formulated a sole issue for determination that is;

“Whether the relief sought by the Applicant amount to an afterthought and can be entitled to the exercise of court's discretion considering the circumstances of this case”

Submits that Applicant's reliance on Section 1 and 14 of the Child Rights cannot avail him in view of the meaning of parent as defined in Webster-Dictionary. Submits further that Respondent is a caring parent and urge court to place reliance on Section 71(1) of the Matrimonial Causes Act in the determination of the application.

Submits that Respondent ran into exile for her dear life as a result of the violent nature of the Applicant, who had on several occasions, beat, injured and wounded Respondent and if Applicant's prayer is granted Respondent will be exposed to avoidable danger attack and violence. Refer to Section 82 (2) of the Evidence Act and the case of Uchi Vs Sabo (2016) Vol. 16 NWLR (PT. 1538) @ 264 – 279. Applicant was economical with the truth as to the facts deposed in his Affidavit in support of the application as he failed to state the reason why Respondent absconded. Thus justifying the fact that Respondent ran into exile for safety and granting prayers of the Applicant will lead to a perverse order. Refer to SPDCN Ltd Vs Agbarah (2016) Vol. 2 NWLR (PT. 1496) @ 353 @ 363.

Submits that court must exercise its discretion judicially and judiciously when called upon to exercise its discretion. Refer to Gen. and Aviation Services Vs Thahan (no citation) Solanke Vs Ajibola (1968) Vol. 11 All NLR 46 @ 54.

Finally urge court to dismiss the application on the strength of the facts contained in Respondent's Affidavit and the authorities cited.

In his reply on points of law, filed on 25/4/2022 Applicant's Counsel submits that Respondents Counter-Affidavit offends the Provisions of

Section 115 of the Evidence Act, particularly Paragraphs 9, 10 and 11, therefore inadmissible as same are defective in substance. Refer to Fin-Union Ltd Vs M.V. Briz (1997) 10 NWLR (PT. 523) 95, Nigeria LNG Limited Vs A. D. I. C (1995) 8 NWLR (PT. 416) 677.

In response to Respondent's Claim that the Applicant's reliefs are not grantable by the court, submit that Applicant's relief are preservatory and deserving of grant, such reliefs are hard in a Matrimonial Proceeding prior to the hearing of the Petition for dissolution of marriage. Refer to Nwosu Vs Nwosu (2012) 8 NWLR (PT.1301) 1; Amcon Vs Suru Worldwide Ventures (Nig) Ltd (2022) 2 NWLR (PT.1813) 163 NNSC Ltd Vs Alhaji Sabana & Co. Ltd (1988) 2 NWLR (PT. 74) 23.

Submits that the court cannot at this stage, determine the issues of violence, assault and paucity of character raised by the Respondent as they are issues for hearing of the substantive Petition. Refer to Agip Nig Ltd Vs Agip Petrol Int'l (2010) LPELR – 250 (SC) and Ojukwu Vs Governor of Lagos State (1986) 2 NWLR (PT. 26) 39.

Submits finally that Respondent has failed to present any sustainable legal argument for court to refuse the reliefs prayed by the Applicant.

Having carefully considered the Affidavit evidence of both parties, submissions of Counsel as well as the Judicial authorities cited, the court find that the only issue that calls for determination in this application is;

“Whether this court can grant the relief sought by the Applicant in the circumstance of this case”

Firstly, Applicant's Counsel raise the Preliminary issues against the Counter-Affidavit of the Respondent that the deposition contained therein are contrary to Section 115 of the Evidence Act. A careful look at the said Counter-Affidavit reveals that Paragraphs 7,9,11,15 and 16 of the Counter-Affidavit are replete with conclusion, prayers legal argument and objections and therefore in contravention of the Provision of Section 115 (2) of the Evidence Act and are therefore struck out.

The grant or otherwise of an application of this nature is at the discretion of the court and in the exercise of that discretion, the court overtime is enjoined to do so judicially and judiciously taken into consideration the facts before it. See the case of Ajuwa Vs SPDC Nig Ltd (2012) All NWLR (PT. 615) 200 @ 219. See also Tanko Vs State (2009) 4 NWLR (PT.1131) 430 @ 441.

In the instant application, Applicant seeks reliefs which touches on the main claims in the substantive Petition. Respondent also in asking the court to refuse the grant of the prayers in this application relies on the issues of violence, assault desertion which are heavily canvassed in the substantive Petition as well. Now, this is an Interlocutory application and the law is well settled that the court hearing an Interlocutory application has no jurisdiction to make any pronouncement which was the effect of determining any of the matters or issues in the substantive case. In other words a court hearing an Interlocutory application must avoid or refrain from making any findings or determination which may prejudice the substantive matter. See Adeleke Vs Lawal (2014) All FWLR (PT.710) 1226

@ 1228. See also *Ugwu Vs Julius Berger (Nig) Plc* (2019) LPELR 47626 (CA).

Granted that this is the position of the law, that a court should avoid making a pronouncement at Interlocutory stage of issues for main trial, in this instance the grant or otherwise is at the discretion of the court, which has to be done based on facts before it. The Applicant has by Paragraph 4,5 and 6 of his supporting affidavit stated facts to support the grant of this application, whereas there is no fact from the Respondent disputing the facts as deposed to by the Applicant. It is trite law that those facts as stated by the Applicant which are not disputed are deemed admitted. See the *Nigerian Army Vs Warrant Officer Bunmi Yakubu* (2013) LPELR (2008) SC.

The primary consideration is the interest of the children that is paramount. I have carefully considered the facts contained in the supporting affidavit, which remain unchallenged and uncontroverted and I find that it would be in the interest of justice to grant this application in the interim pending the determination of the substantive case.

In conclusion, this application has merit and is allowed. The following Orders are hereby granted as prayed.

- (1) An Order of this Honourable Court directing the Respondent to produce the only child of the marriage, Oritsemoyowa Daniella Etuwewe, wherever she may be on the next adjourned date to enable the Petitioner to see her, having not seen nor heard from her for over two years at the behest of the Respondent.

- (2) An Order of this Honourable Court directing the Respondent or any other person in the position to do so grant the Petitioner/Applicant access to the child at reasonable times as the need may arise pending the determination of this suit.
- (3) An Order restraining the Respondent or her privies from taking the only child of the marriage out of the Federal Republic of Nigeria without the knowledge and consent of the Petitioner pending the determination of this suit.

Signed
HON. JUSTICE C.O. AGBAZA
Presiding Judge.
21/09/2022

APPEARANCE:

OBINNA VAL EZEMBA ESQ. FOR THE PETITIONER/APPLICANT

I.I. DAMISA ESQ. FOR THE RESPONDENT