

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA-ABUJA
ON MONDAY THE 20TH DAY OF NOVEMBER, 2023**

**SUIT NO: FCT/HC/CV/1400/2022
MOTION NO.: FCT/HC/GWD/M/291/2022**

BEFORE HIS LORDSHIP: HON. JUSTICE A. I. AKOBI

BETWEEN

1. MR. OLUMIDE OYEBADE
2. MR. BENSTOWE IBIWARE
3. MR. SULE BITRUS TSAKU
4. MR. EMMANUEL HUA
5. OCHANG FESTUS B.
6. KINGSLEY KPENOSEN
7. JAMES WAMADIJU
8. MR. SHIMA ISAAC
9. MS LAURETTA AISHA AKWASHIKI
10. MR. MONDAY AHMED
11. SOBOMABO AMACHREE
12. MR. EPHRAIM TIMLOH
13. MRS. UFON OBOT
14. MRS. MARY IJIDAI BITRUS
15. MRS MARIAM ADAMA
16. MR. WILCOX UDUEZUE
17. MR. STANLEY EGENTY
(For themselves and on behalf of
Concerned Residents of Southend Estate)

.....CLAIMANTS/
RESPONDENTS

AND

1. SOUTHEND ESTATE MUSLIM RESIDENTS'
ASSOCIATION

} ...DEFENDANT/APPLICANT

2. MERCH SAMUELSON PROPERTIES LTD
3. ABUJA METROPOLITAN MANAGEMENT
CONTROL

}DEFENDANTS/
RESPONDENTS

R U L I N G

Claimants initiate this suit against the defendants vide a Writ of Summons dated 18/04/2022 and filed on the 29/04/2022. The claimant filed along the writ a motion on notice and ex parte application. The ex parte application was taken and granted on the 30/06/2022, pending the hearing and determination of the motion on notice. The 1st – 3rd defendants filed memorandum of conditional appearance and issues have been joined by filing statements of defense. However, while the motion on notice was still pending and yet to be heard, the 1st defendant filed a notice of preliminary objection against the jurisdiction of this Honourable Court to entertain and determine the claimants' suit on 29/07/2022. Considering the principle of law that once an issue of jurisdiction of the court is raised before the court at any stage of the trial, the court must first determine it before taking any step in the matter; I proceeded to hear the application challenging the jurisdiction of the court. However, the hearing of the preliminary objection suffered set back due to one adjournment or the other for reason of lack of service and other intervening circumstances.

On the 04/04/23, when it became obvious again to the court that the preliminary objection will not be heard for that day for non service of hearing notice on the 2nd defendant; this ugly development of one adjournment to another stalled the hearing of the pending motion that was filed before the preliminary objection. Eventually, the application for preliminary objection was heard on

the 04/07/2023, alongside two other motions after heated argument as to whether the two motions should be heard or not. On that day, all parties were represented by their respective counsel in court. The court first heard and granted a harmless application filed by the 3rd defendant for extension of time to file memorandum of conditional appearance and statement of defense out of time. Thereafter, the lead counsel, S. M. Rilwanu Esq moved on behalf of the 1st defendant the notice of preliminary objection.

The preliminary objection is dated and filed the 29/07/2022 praying the court for an order striking out the claimant's suit for being incompetent. The ground for the objection is that the claimants/respondents' suit is incompetent as the writ of summons is defective and invalid; particularized as follows:

- a. The Claimants/Respondents commenced the suit vide a writ of summons dated the 18th day of April, 2022 and filed on 29th April, 2022.
- b. The writ of summons is not signed by any of the claimants or their legal practitioner.

The application is supported by 8 paragraphs of affidavit deposed to by one Michael Gbenga Adebisi, a litigation secretary of Hope Attorneys, of counsel to the 1st defendant with an annexure marked **Exhibit 1** and a written address. Also filed is a reply on point of law dated and filed on the 31/1/23 in response to the counter affidavit filed by the claimants on the 24/1/23. They also filed a written address in support of same. The counsel adopt both

written addresses, their argument in urging the court to strike out the suit and discountenance the claimant counter affidavit of 24/1/23.

In reaction to the Notice of Preliminary Objection, Abubakar E. Animiokhali Esq of counsel to claimants informed the court that they have two counter affidavits before the court, one filed on 24/1/23 and the other on the 4/4/23 and the counsel proceeded to apply to withdraw that filed on 24/1/23. Without waiting for the court to deliver ruling on application to withdraw counter affidavit filed on the 24/1/23, the counsel proceeded to move his motion dated 2/03/23 and filed on 4/4/23 for extension of time for claimants to file counter affidavit in opposition to the 1st defendant preliminary objection dated and filed 29/07/2022. He regarded the application as harmless and urged the court to grant the application to enable them respond to the preliminary objection.

Counsel to the 1st defendant reacted to the said application for extension of time and objected to granting the application. He anchored his objection on the following fact: (a) that the counter affidavit of 24/1/23 was in reaction to the Notice of Preliminary Objection of the 1st defendant filed on the 29/07/2022. Hence, that the claimants cannot withdraw that counter affidavit because issues have been joined; the 1st defendant having responded to the issues raised in that counter affidavit by filing a reply on point of law on the 31/1/23; more so, that the application

for withdrawal came after the preliminary objection and reply on point of law has been adopted and submitted that to allow the withdrawal will amount to allowing the claimants to over-reach the 1st defendant. I am referred to section 169 of the Evidence Act.

This matter is therefore adjourned to today (20/11/2023) for rulings on application for withdrawal of counter affidavit of 24/1/23 filed by the claimant/respondents in opposition to 1st defendant/applicant's Notice of Preliminary Objection and on the preliminary objection against the suit of the claimants. Having been served with the 1st defendant's preliminary objection, the claimants have the right under the law to respond to such process. It is in fulfillment of such right that the claimants filed counter affidavit in reaction to the preliminary objection. The counter affidavit is a follow up of the preliminary objection; it is therefore my opinion that despite the existence of an application challenging the jurisdiction of this court, it is most appropriate for the court to first resolve the counter affidavit to be used as challenging the preliminary objection; whether it should be that of 24/1/23 as argued by the 1st defendant or that of 4/4/23 argued by the claimants.

The fact of the case as regard to the counter affidavit as enumerated and captured above is that after serving the claimants with the preliminary objection with its supporting affidavit, the claimants filed counter affidavit in opposition to the

preliminary objection on the 24/1/23 duly served on the 1st defendants. On being served with the claimants' counter affidavit, the 1st defendant in exercise of its right under order 43 rules 1(4) of the rules of this court in opposition to the counter affidavit filed a reply on point of law on the 31/1/2023. The 1st defendant adopted his processes to wit: the preliminary objection, the reply on point of law, all the written addresses attached thereto and its arguments on the 04/7/2023. Thereafter, the learned counsel to the Claimants applied to withdraw the counter affidavit filed on the 24/1/23 and urged the court to adopt instead the counter affidavit filed on the 4/4/23. This did not go down well with the 1st defendant and he opposed it based on reasons stated on its reply on point of law filed on the 31/1/2023.

I want to first of all consider the propriety of seeking for the withdrawal of counter affidavit filed on the 24/1/23 by the claimants in opposition to the preliminary objection of the 1st defendant/applicant. I am of the opinion that a party who filed a process is free to withdraw same; he knows what he requires for his case and what he does not require. No Court can insist that a party must utilize a process he filed and wishes to withdraw except when such withdrawal will occasion miscarriage of justice and/or overreach the opposing party. The basic reason on record why the 1st defendant objected to the withdrawal of the counter affidavit filed by the claimants/respondents on 24/1/23 is that it has joined issue by filing reply on point of law before the

subsequent filing of counter affidavit of 4/4/2023. This argument was not supported by any authority and I was unable to lay my hands on any. However, there are plethora of judicial authorities to the effect that when a suit is filed, issues joined, application can be made to discontinue or withdraw the suit. In such circumstance, the court instead of striking out the suit will dismiss it for the reason that issues were joined before the discontinuous/withdrawal. See **Benjamin & Ors v. APC & Ors (2022) LPELR-59051 (CA)**. Following the above analogy of the substantive suit, I hold that a counter affidavit can be withdrawn even after joining issues.

I have also carefully read the said counter affidavit filed on the 24/1/23, that of 4/4/203 vis-a-vis the reply on point of law filed by the 1st defendant on the 31/1/23, I am unable to see any fact(s) that is overreaching to the 1st defendant as to deny application for withdrawal. In the light of the above, I hereby grant the application to withdraw the counter affidavit of the claimants/respondents filed on the 24/1/2023. Having withdrawn the counter affidavit filed on the 24/1/23, every other process that stands on it collapsed like a pack of card. In view of that, motion for extension of time moved on the 4/7/23 filed on the 4/4/23 is granted.

Having dispensed with the application to withdraw counter affidavit of 24/1/23, I will now proceed to resolve the Notice of Preliminary Objection filed by the 1st defendant. The learned

counsel Mr. S. M. Rilwanu formulates two issues in their written address in support of the preliminary objection as follows:

- 1. Whether the Writ of Summons filed in this suit is not invalid, and**
- 2. Whether the jurisdiction of this Honourable Court to entertain and determine the claimant's suit is not ousted.**

On the first issue, the counsel argued that the facts before the court via affidavit evidence in support of the preliminary objection, the record of the Honourable Court (Exhibit 1) shows that the Claimant initiates this suit against the defendants vide Writ of Summons issued by one Abubakar Animiokhali, Esq of Abubakar E. Animiokhali & Co. but that it is not signed by the said Abubakar Animiokhali Esq or any of the claimants. He canvassed that an unsigned document is worthless. For an originating process he cited the case of **M.C.C (Nig) Ltd v. Coseda (Nig.) Ltd (2018)11 NWLR (PT.1629)47 at 58 paras A-B** thus:

“Endorsement of address of counsel on the document is just one of the things required to be stated on the originating process. If the originating process is not signed by either the claimant or his legal practitioner to prove its source or origin, the originating process cannot be proved to have been signed by the claimant or legal practitioner and it cannot be claimed to have been prepared by either of them. This is the reason why in Oketade v. Mrs Olayinka Adewunmi & 4 Ors (2010)8 NWLR (PT.1195)63, the

court while dealing with a petition which is an originating process just like a writ of summons held that once an originating process like a petition has not been signed by either the petitioner or the legal practitioner, the petition is incompetent”.

On this same principle of law, the counsel cited more judicial authorities inter alia is the case of **Dannet Owoo & Anor v. Effion (2020) LPELR-50079 (CA)**; and reproduced the holding of the court thus:

“That failure to sign a Writ of Summons as required by law fundamentally affects the validity of the claimant's suit, as it calls the competence of the suit and the jurisdiction of the court in question. The law is well settled that an originating process, such as a writ of summons, must be signed by the litigating party or legal practitioner on his behalf. In the instant case, the writ of summons which was not signed by the respondent and/or his counsel acting on his behalf robbed the court below of the necessary jurisdiction to entertain the case. This is because an unsigned originating process as the writ of summons in the instant case renders the process invalid and the jurisdiction of the court is ousted. Meanwhile, the failure to commence proceedings with a valid writ of summons goes to the root of the case and any order emanating

from such proceedings is liable to be set aside as incompetent and a nullity.”

In reaction to the preliminary objection, Claimants/Respondents filed counter affidavit of 15 paragraphs on the 04/04/23 but deem properly filed on the 4/7/23, deposed to by the 2nd Claimant on record for himself and on behalf of other claimants and a sole issue is raised in their written address for the court’s determination thus: **Whether the application brought by the 1st defendant/applicant can be granted by the court as prayed.** The learned counsel to the claimants in arguing the sole issue claimed that the application filed by the 1st defendant/applicant is such that cannot be granted because the court is called upon by them to avoid doing substantial justice and dwell solely on technical justice. Reference is made to paragraphs 8, 9 and 10 of the counter affidavit and then submitted that there is no provisions in the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2018 or anywhere in any practice Direction, wherein the counsel issuing a writ is mandated to sign the writ to make it valid. He added that the practice of signing writs before the FCT High Court by counsel is a misconstruction of the provision of **Order 2 rule 2(5) of the High Court of the Federal Capital Territory (Civil Procedure) RULES.** He asserted that the specimen of a writ of summons provided in Form 1 of the Rules of this Honourable Court in accordance with the contemplation of Order 2 Rule 2(5) has no provision for the signature of either the Claimant or the Counsel representing the Claimant; rather, it is only the Registrar that is required to append his signature on the writ.

The claimants canvassed further that the rules of this court did not define writ of summons; but suffice to say that a writ of summons may be rightly described as one of the components for commencing an action in a civil proceedings in accordance with Order 2 rule (1 & 2) of the Rules of this court. But that the rules defined “Court Process” or “Process” to include summons, originating summons, originating process, Notices, Petition, Pleadings, Orders, motions, affidavits, warrants and all documents or written communications of which service is require”. He amplified the above definition to mean that an Originating Summons is a series of a writ of summons and all the accompanying court processes listed at Order 2 Rule 2(2) of the rules of this court. He submitted that a legal practitioner representing a Claimant is obliged to sign all other processes that may accompany the Originating Process, while the Writ is to be signed by the Registrar and not the Counsel. The Court is referred to Order 2 rule 2(5) as well as Form 1 of the Rules of this Court and paragraph 4 and 5 of the counter affidavit.

In an alternative argument, the counsel submitted that assuming without conceding that a writ requires the signature of the counsel representing the Claimants to be valid, it still will not suffice to say that the writ that initiated this suit was not signed by the counsel representing the Claimants. To support this, he cited judicial authorities as to what buttress signature. **Aiyedun v. Registrar, Upper Area Court Ilorin & Ors (2016) LPELR-41186 CA**; **Skypower Express Airways Ltd v. UBA, Plc & Anor (2022) LPELR -56590**, In the latter case the Supreme Court held thus:

"In *SLB Consortium Ltd v. NNPC* (2011)9 NWLR (PT. 1352) 3`7, this court, per **Rhodes-Vivour, JSC** underscored the importance of the way counsel chooses to sign a court process and how all processes to be filed in court shall be signed by counsel. His Lordship explained that: 'Once it cannot be said who signed a process, it is incurably bad, and rules of court that seem to provide a remedy are of no use as a rule cannot override the law (i.e. the Legal Practitioner Act).

To resolve the preliminary objection, I adopt the two issues raised but shall address them together. All processes filed in court are to be signed as follows:- First, the signature of counsel, which may be any contraption. Secondly, the name of counsel clearly written. Thirdly, who counsel represents. Fourthly, name and address of legal firm. The position was restated by the learned Law Lord in the case of **Nigerian Army v. Samuel (2013)14 NWLR (PT.1375)446, 485** to settle the appropriate manner, way or mode for proper and valid signing of all court processes by counsel representing parties recognized by law." (Our emphasis). Considering the above position of the law, the learned counsel to the claimant view the argument of the 1st defendant that writ ought to have been signed by the counsel for the claimants/respondents as absurd and unknown to the provision of the rules of this Honourable Court. The court is therefore urged to discountenance all the submission of the counsel to the 1st defendant/applicant and hold that the writ with which the claimants/respondents initiated their suit is valid.

After the claimants/respondent's counsel concluded their argument against the preliminary objection, the 1st defendant counsel who did not file any reply to the claimants' counter affidavit filed on the 4/4/23 deemed filed on 4/7/23, replied orally on point of law where he submitted that the counter affidavit of 4/4/23 is void and null because no leave of court was sought and obtained for it to be filed as a 2nd counter affidavit and that the law does not allow filing of processes after issues have been joined. He also contended that paragraphs 10, 11, 12, 13 and 14 of the counter affidavit of 4/4/2023 are in violation of section 115 of the Evidence Act. It is also his contention that assuming though not conceding that there is no such violation, that the said counter affidavit violated the provision of Order 56 Rule 1(1)(2) and (3) of the rules of this court that made provision for payment of penalty of N200 per day of default; that there is nothing on the face of the counter to show that penalty for default was paid, hence, the court is urged to discountenance the submission of the claimant and strike out the averment.

I want to quickly state here that the 2nd and 3rd defendants did not file counter affidavit to the preliminary objection filed by the 1st defendant. However, C.S. Onah Esq and M.S. Ugwu Esq who represented respectively the 2nd and 3rd defendants aligned themselves to the submission of the 1st defendant and added that the matter be struck out.

Having carefully read all the averments in the affidavit in support of the Notice of Preliminary Objection, the counter affidavit, the

arguments and submissions of the parties vis-à-vis the relevant statutory and judicial authorities and in order to resolve the Preliminary Objection I adopt the two issues formulated by the 1st defendant/applicant but will address them together. The issues are reproduced above, but for ease of reference, they are hereunder stated:

- 1. Whether the Writ of Summons filed in this suit is not invalid, and**
- 2. Whether the jurisdiction of this Honourable Court to entertain and determine the claimant's suit is not ousted.**

The grouse of the 1st defendant/applicant is that the writ of summons which initiates this action is invalid due to non compliance with the rules of this court. The relevant paragraphs of averment alleging these facts are herein reproduced:

Par 5: That I was informed by A.I. Abbas, of counsel to the 1st defendant, on the 22nd day of July, 2022 in our office at about 3.00pm and I verily believe him that-

- a. He went through the Writ of Summons in this case and discovered that the Writ was not signed by any of the Claimants or their legal practitioners;
- b. To be sure of what was before the court, he caused an application to be made to the court for the issuance of a certified true copy of the writ of summons;

- c. That Certified True Copy of the Writ of Summons filed by the Claimants indicates that the writ on record is not signed by any of the claimants or their legal practitioners; and
- d. He has raised a preliminary objection to the jurisdiction of this Honourable Court to entertain and determine the Claimants case based on the defective and invalid Writ of Summons in the case.

It is beyond doubt and a trite law that the validity of an originating process in a proceeding before a court is fundamental and necessary requirement for the competence of a suit. Thus, failure to commence a suit with a valid writ goes to the root of the action and robs the court of its jurisdiction. See **Madukolu v. Nkemdilim(1962)LPELR-24023 (SC)**. The general and acceptable law is that unsigned document is worthless and of no use at all. This takes me to the writ of summons filed by the claimants on the 29/04/2022.

What is the consequence of unsigned writ of summons? This question was answered by the Court of Appeal in the case of **Alhaji Umaru Aliyu Technical v. FBN & Anor (2018) LPELR-44663 (CA)** cited by the 1st defendant. The Court in that case held as follows: “.....the position of law is that an unsigned writ of summons is out rightly void and not even a subsequent Amended writ could effect a cure to it. It is void and remains void and nothing can be added to it. See **NZOM & ANOR vs. JINADU (1987) 2 SC 205**. The consequence of a void writ of summons is that the case it has acted as an initiating

process remains incompetent and this will deprive the Court of the jurisdiction to entertain same. The principle enunciated in the case cited above is the law, and I do not think the parties have problems with that.

I have carefully examined the writ of summons in issue and observed that the writ is duly signed by the Registrar. However, the bone of contention is that the writ is not signed by any of the claimants nor their legal practitioner. The question to be asked is: whether a writ of summons must be signed by a claimant or his legal practitioner for the writ to be valid? The 1st defendant's answer to the question is in the affirmative while the claimants' answer is on the contrary. To support his stance, the learned counsel to the 1st defendant cited couple of authorities including the case of **Dannet Owoo & Anor vs Effion** (Supra). In that case the decision was based on Cross River State High Court (Civil Procedure) Rules 2008, which provides in Order 8 Rule 2(1) as follows: the registrar shall seal every originating process whereupon it shall be deemed to be issued. (2) A claimant or his legal practitioner shall on presenting any originating process for sealing leave with the registrar as many copies of the process as there are defendants to be served and one copy for endorsement of service on each defendant. (3) Each copy shall be signed by the legal practitioner or by a claimant where he sues in person and shall be certified after verification by the registrar as having a true copy of the original process filed. It can be deduced from the above that the Cross River State High Court Civil Procedure Rules clearly made provision for the signing of the process by the legal practitioner or by

a claimant where he sues in person. Claimants have submitted in paragraph 2.2 of their written address in support of their counter affidavit that there is no provision in the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018, or any Practice Direction wherein the counsel issuing a writ is mandated to sign the writ. The counsel referred to **Order 2 rule 2(5)** of the rules of this court and reproduced same as follows:

“Except in the cases in which different forms are provided in this rules, the writ of summons shall be as in Form 1 with such modifications or variations as circumstances may require as in Form 33 (Fast Tract)”

The counsel submitted based on the provision of Order 2 rule 2(5) reproduced above that the specimen of a writ of summons provided in Form 1 of the Rules of this Honourable Court made no provision for the signature of either the Claimant or that of the Counsel representing the Claimant; that the only provision is for the signature of the Registrar. The counsel added that the rules of this Honourable Court did not contemplate that a writ wherein a provision is made for the signature of the Registrar will have to be signed by a counsel for it to be valid. For emphasis, he concluded on this that it is only the Registrar that is required to append his signature on the writ.

On careful reading of Order 2 rule 2(5) of the rules of this court and on perusal of **Form 1** of the rule, I am persuaded by the submission of the Claimants/respondents that the rules of this court did not make provision for the signature of the claimant or legal practitioner to the

claimant; it is solely the prerogative of the registrar to sign the writ of summons and I so hold.

The other argument which warranted the filing of the preliminary objection is that the counter affidavit of 4/4/23 was filed after issues had been joined in the counter affidavit of 24/1/23. This issue has earlier been addressed above in this ruling, hence, I do not want to go over it again.

The other argument raised during the reply on point of law is that paragraphs 10, 11, 12, 13 and 14 of the counter affidavit of 4/4/23 are in violation of section 115 of the Evidence Act which requires affidavit to contain only statement of facts as against extraneous matter such as objection, prayer, legal argument or conclusion. I carefully went through the said paragraphs of the counter affidavit, found paragraph 10 offensive to section 115 of the Evidence Act as it is a conclusion and is hereby struck out. However, I do not agree with the submission in respect of paragraphs 11 – 14.

The other ground of objection that arose during reply on point of law by the 1st defendant is that the counter affidavit filed on the 4/4/2023 is in violation of Order 56 of the rules of the court that requires payment of penalty for failure to file within time. This court is guided by its record. The record of the court shows evidence of proof of payment for default fees via a receipt dated 4/4/23 for a total amount of N14, 000.000 a default of 70 days. I therefore overruled the submission of the 1st defendant on these points.

The court having come to the above conclusion based on the facts before it, I hereby resolved the issue in favour of the Claimant/Respondents and hold that the writ of summons that initiates this action is in line with the rules of this court, I therefore found it valid. Hence, this court has the jurisdiction to entertain and determine the suit. In that vein, the preliminary objection is overruled for lacking in merit. The parties are therefore ordered to file their pleadings, exchange same for the matter to be heard on merit.

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HON. JUSTICE A. I. AKOBI
20/11/23