IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS MONDAY, THE 21ST DAY OF JUNE, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1330/2020
MOTION NO: GWD/M/145/2020

BETWEEN:

AKOJI SAMUEL
(Suing through his Lawful Attorney Christopher Anosike Anyiam.) **……..…… APPLICANT**

AND

1. **GWAGWALADA AREA COUNCIL**
2. **FCT SECONDARY EDUCATION MANAGEMENT BOARD**

RESPONDENTS

JUDGMENT

This is an application brought pursuant to the Fundamental Rights Enforcement Procedure (FREP) Rules, 2009. The application was filed on 4th March, 2020 at the Court's Registry.

The Reliefs sought as contained in the statement accompanying the application are as follows:

1. **A Declaration that the compulsory acquisition of the Applicant's property situate and known as Plot No 400 lying and situate within cadastral zone**

04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 (Customary) certificate of occupancy in the land administration land registry office at Abuja and annexed to the 2nd Respondent's School called Government Junior Secondary School, Tunga Maje, Gwagwalada Area Council, FCT, Abuja without any compensation is a flagrant violation of the Applicant's fundamental right to prompt compensation for compulsory acquisition of property as contained in Section 44 (1) (a) of the 1999 Constitution as amended.

2. **A Declaration that the Applicant is entitled to a prompt adequate compensation as a result of the compulsory acquisition of the said property known as Plot No 400 lying and situate within Cadastral Zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) NO: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 (customary) certificate of occupancy in the land administration land registry office at Abuja.**

3. **An Order mandating the Respondents jointly and severally to pay the Applicant the total sum of N3M being the value of the said plot as contained in the valuation report prepared by Kachi Okpara & Co dated 15th November, 2019.**

4. **And for such further Order and Orders as the Honourable Court may deem fit to make in the circumstances.**

OR IN THE ALTERNATIVE:

An Order of the Court mandating the 1st Respondent to allocate another property to the applicant forthwith in a suitable place of the same value.

The Grounds on which the application is based are:

a. **That by virtue of Section 43 of the 1999 Constitution, the Applicant has a right to acquire and own immovable property in Nigeria.**

b. That by virtue of Section 44 (1) (a) of the 1999 Constitution, the Applicant has a right to prompt payment of compensation upon the compulsory acquisition of her property.

c. That the Respondents having compulsory acquired the property known as Plot No 400 lying and situate within Cadastral Zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 customary certificate of occupancy in the land administration land registry office at Abuja belonging to the Applicants and having failed to offer any compensation, the Applicant is entitled to enforce his fundamental right as contained in the said Section 44 (1) (a) of 1999 Constitution.

d. The Applicant is the owner of Plot No 400 lying and situate within cadastral zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 customary certificate of occupancy in the land administration land registry office at Abuja, which plot was forcefully acquired by the Respondents.

e. The Respondents granted and took possession of the said plot of land without the consent of the Applicant and without compensating the Applicant.

In support of the Application is a twenty (20) paragraphs affidavit deposed to by the Applicants lawful attorney with six (6) Exhibits attached and marked as **Exhibits 1 – 6**. A very brief written address was filed in compliance with the FREP Rules in which one issue was raised as arising for determination as follows:

"Can this court hold that the Fundamental Right of the Applicant was breached."

The address of Applicant which forms part of the Record of Court is substantially to the effect that the compulsory acquisition of his plot of land without hearing from him and also the failure to pay compensation contravened the provisions of

Section 43 of the 1999 Constitution which accordingly entitled him to the Reliefs sought. The Applicant also filed a further and better affidavit dated 5th February, 2021 deposed to by one Monday Odiba.

In opposition, the 1st Respondent filed the following processes:

1. **Notice of Preliminary Objection dated 8th July, 2020.**

2. **1st Respondent's counter affidavit to the originating motion dated 8th July, 2020.**

In the preliminary objection, the grounds of the objection are as follows:

1. **That the action was not initiated by due process of law.**

2. **That the requisite pre-action notice was not served on the 1st Respondent before the action was commenced against 1st Respondent.**

The objection is supported by a written address in which one issue was raised as arising for determination to wit:

"Whether this action is competent"

Let me quickly state that at the hearing, counsel to the 1st Respondent **abandoned** the second leg of the objection on issuance of a pre-action notice and same was struck out. Accordingly submissions relating to the issue on both sides of the aisle shall be discountenanced.

The submissions on the remaining sole ground of objection equally forms part of the Record of Court and the point made out is that the principal Relief(s) of Applicant relates to declaration of title and compensation and not enforcement of a fundamental right and that the jurisdiction of court cannot be properly invoked in such circumstances and that the case is liable to be struck out.

The Counter-Affidavit filed by the 1st Respondent to the substantive application contains twelve (12) paragraphs. A brief written address was filed in which one issue was raised thus:

Whether the Applicant is entitled to the reliefs sought.

The case made out in the address which also forms part of the Record is simply that the 1st Respondent has denied that it encroached on Applicants plot and land which is still intact and that the Applicant has never applied for and was not granted a development approval in respect of the land and that Applicant has no improvement on the land and accordingly that the Applicant is not entitled to any of the Reliefs claimed.

In opposition to the preliminary objection, the Applicant filed a reply address on 5th February, 2021 which forms part of the Record of Court. The substance of the submissions is to the effect that the principal Reliefs of the Applicant are for compensation for compulsory acquisition of his land which relates to the enforcement of his Fundamental Rights which can be heard and determined by this court. As stated earlier, the aspect of the objection relating to issuance of a pre-action was withdrawn by the objector and is therefore no longer germane.

The Applicant equally filed a reply on points of law in opposition to the 1st Respondents' counter-affidavit dated 5th February, 2021 which essentially sought to accentuate the points already canvassed in the address in support of the substantive application.

On the Record, the 2nd Respondent was served the originating court process and hearing notices at different times, but they choose or elected not to respond.

Guided as I am by the provision of **Order VIII, Rule 4 of the FREP Rules**, which prescribed that the preliminary objection shall be heard with the substantive application clearly to save precious judicial time, the court directed that the objection and the substantive application be taken together.

Counsel on either side then moved and adopted the process filed as identified above and each side equally responded. The Applicant urged the court to dismiss the Preliminary objection and grant the reliefs sought. On the other side of the divide, the court was urged to sustain the preliminary objection, but where it is not availing, that the court should dismiss the substantive action as wholly lacking in merit.

I have given an insightful consideration to all the processes filed by parties together with the oral amplification by respective learned counsel and it seems to me that notwithstanding the volume of the processes filed, the issue to be resolved from the materials before the court falls within a very narrow legal compass and that is whether on the facts and materials before court, the Applicant has proved that his fundamental human rights were violated by Respondents to entitle him to the reliefs sought.

The 1st Respondent has as stated earlier raised the question of the competence of the case which must be dealt with as a threshold issue. Counsel to the 1st Respondent has also in his address raised the point that the Reply address filed by the Applicant in response to the Preliminary Objection was not filed within five (5) days as allowed by the provision of **Order II Rule 6 of the FREP Rules** and thus incompetent. Let me quickly deal with this point.

Now for me, in view of the nature of the objection which is anchored principally on whether or not the violation of Fundamental Rights sought to be enforced by Applicant are the principal or main reliefs and this is a matter that can only logically be determined by a careful evaluation of the facts and Reliefs denoted in the substantive action, then any complaint with respect to a reply **address** would lack real legal and indeed factual resonance since the **Reply address**, strictly speaking cannot add to or alter the nature of **reliefs** as encapsulated in the originating processes which the court will be concerned with in resolving the objection.

Learned counsel to the 1st Respondent has rightly referred to authorities to the effect that the key determinant of this objection and indeed in determining jurisdiction, the court must be guided by the Reliefs sought in the originating process filed. That it is not the manner a claim is couched or the categorisation given to it; that the court has to carefully examine the **reliefs** to ascertain what the claim is all **about**. That is as it should be. The reply in the circumstances is largely not material in the context of determining the jurisdiction of the court to entertain the extant action.

Let me however still add that it is true that **Order II Rule 6 of the FREP Rules** has streamlined five (5) days for the filing of a response or reply. On the record,

the plaintiff was served on 9th July, 2020 with the objection but filed its response on 5th February, 2021 clearly outside the time frame as allowed by law. However **Order IX Rule 1 of the FREP Rules** provides that: **"Where at any stage in the course of or in connection with any proceedings, there has, by any reason of anything done or left undone, been failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings..."** In other words, the late filing of the Reply to the preliminary objection is at best an irregularity and as already held is not even decisive in the context of the present complaint.

The law is settled that it is not every irregularity that automatically nullifies an entire proceeding, particularly where the irregularity did not in any way materially affect the merits of the case, as in the present situation or occasion any miscarriage of justice. See **Emedo V State (2002) 15 NWLR (pt.789) 196; Famfa Oil Ltd V A.G. Fed (2003) LPELR – 1239 (SC).** The 1st Respondent has not situated or stated how the Reply, even if used will affect their position or cause a miscarriage of justice.

On the whole and in view of the defined legal positions as demonstrated above, the submissions on the late filing of the Reply address would only have peripheral significance, if any at all.

Now as to the key question of competence of the application and whether the action is cognisable under the Fundamental Rights Enforcement Procedure, it is a fundamental principle of law and of general application that the jurisdiction of the court is generally determined by the reliefs sought by the plaintiff or in this case, the Applicant. See **Abubakar V Akor (2006) All FWLR (pt.321) 1204**. In other words, it is the claim before the court that has to be carefully examined to ascertain whether or not the action or case filed comes within the jurisdictional sphere conferred on that court. The Relief which may be sought by an Applicant under the FREP Rules are however specifically limited to any of the fundamental rights prescribed and embodied in chapter IV of the 1999 Constitution. See **Fajemirokun V C.B.C.I (Nig.) (2002) 10 NWLR (pt.774) 94**.

In law, the breach of a fundamental right alleged by an applicant must be the main plank in the application for enforcement. On the authorities, where the violation of

a fundamental right is merely incidental or ancillary to the principal claim or relief, it is improper to constitute the action as one for enforcement of a fundamental right. This law traces its pedigree to the *latin maxim*: "*Accessorium non-ducit, sed sequitur suum principale*" – meaning that which is incidental does not lead, but follows its principal. See **Raymond Dnogtoe V Civil Service Commission of Plateau State (2001) 19 WRN 125 at 147; Basil Egboona V Borno Radio Television Corporation (1993) 4 NWLR (pt.285) 13**.

The duty of court now is to carefully examine the reliefs claimed to situate their justiciability within the frame work of enforcement of Fundamental Rights. The court is here not concerned with the manner in which the claim is couched or the categorization given by parties; the claim or reliefs must indeed speak of enforcement of these streamlined rights under Chapter IV of the Constitution. See **N.A.E.C V Akinkunmi (2008) 9 NWLR (pt.109) SC 151.**

I have at the beginning of this Judgment stated the **Reliefs** of Applicant. I need not repeat myself. Let me now situate the facts as disclosed in the affidavit which obviously are the materials to support the **Reliefs** sought. As already alluded to, it is these **facts** that must be examined, analysed and evaluated with utmost circumspection to see, firstly, that the breach of Fundamental Right is the main plank of the case for enforcement and if this issue is answered in the positive, then secondly if a case has been made out that an applicant's Fundamental Rights have been infringed as claimed or otherwise dealt with in a manner not countenanced by the constitution.

In this case, I prefer to allow the applicants affidavit speak for itself. The following paragraphs are relevant:

"1. That I am the lawful owner of the property known as Plot No 400 lying and situate within cadastral zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 customary certificate of occupancy in the land administration land registry officer at Abuja.

4. **That I bought the said Plot No 400 lying and situate within Cadastral Zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. vi customary certificate of occupancy in the land administration land registry office at Abuja from Mr. Akoji Samuel sometime on the 11th of October, 2010 for a fee of One Hundred Thousand Naira. A copy of the Conveyance of Provisional Approval and Certificate of Occupancy (Customary) is hereby annexed as Exhibit 1.**

5. **That I bought the said property from Mr. Akoji Samuel sometime in October, 2010 wherein he donated in my favour an irrevocable power of attorney in respect of the property. Copy of the said Irrevocable Power of Attorney is hereby annexed as Exhibit 2.**

7. **That the area where the plot was located was a bush apart from the school fence which was about a plot or two away from it.**

9. **That I paid a visit to the said plot sometime in August, 2019 only to discover that Government Junior Secondary School, Tunga Maje which is under the supervision, management and authority of the 2nd Respondent, has encroached on the plot by completely fencing and annexing it as part of the school plot without authorization or any form of compensation.**

10. **That a discreet investigation I conducted shows that the said plot was never originally part of the school plot.**

11. **That as a result of the encroachment by the school I instructed Chidi Akunakwe & Company to write formally to the Respondents to inform them about the recent development but till date they have failed to reply the letter from my lawyer. Copy of the said letter is hereby annexed as Exhibit 4.**

12. **That my lawyer told me sometime in November, 2019 at about 3pm on phone and I verily believe him that he visited the office of the 1st**

Respondent to follow up the letter and was informed by the Personal Assistant to the Chairman that the school acquired the property for public use and therefore, there was nothing they could do.

13. That the 1st Respondent under (sic) who allocated the land to me and under whose jurisdiction the land is, is aware of the manner and illegal way my plot was compulsorily acquired from me without my consent or compensation.

14. That at no time did the 1st Respondent inform or notify me of their intention of revoking the said certificate of occupancy granted to me.

15. That I was never aware of the recemt encroachment by the 2nd Respondent until late 2019 when a visit was paid to the plot for assessment."

I have deliberately and at some length provided the basis above of the foundational premise of the Applicants case. I have carefully examined the facts vis-a-vis the reliefs sought and it is difficult to situate how the breach of fundamental right(s) alleged by the applicant is the main plank in the extant application for infringement.

The case from the above affidavit is simply that the lawful attorney claims to be the owner of the property known as Plot 400 which he said he bought from one Akoji Samuel. In paragraph 9, he stated that sometime in August 2019, he discovered that Government Junior Secondary School Tunga Maje under the supervision of 2nd Respondent has **"encroached on the plot by completely fencing and annexing it as part of the school plot without authorisation or any form of compensation."** In paragraph 12, the deponent stated thus:

"12. **That my lawyer told me sometime in November, 2019 at about 3pm on phone and I verily believe him that he visited the office of the 1st Respondent to follow up the letter and was informed by the Personal Assistant to the Chairman that the school acquired the property for public use and therefore, there was nothing they could do."**

The above averment is clear and self-explanatory.

Learned counsel to the Applicant may have adroitly framed the case as that of compulsory acquisition and compensation but a careful examination of the facts in applicants affidavit does not bear this proposition out. It must be noted that this is an originating application decided solely on the basis of the quality and credibility of the affidavit evidence. In this situation, there is no scintilla of evidence denoted in the affidavit of Applicant situating any compulsory acquisition of Applicant's land or revocation of land by Respondents or indeed anybody. If there was a compulsory acquisition, or revocation, this cannot simply hang in the air or be made in a vacuum or subject of unfounded speculation or conjectures. There has to be a clear verifiable basis to situate compulsory acquisition of land or revocation in clear compliance with the provisions of the law.

The bottom line is if Applicant found as demonstrated in his affidavit that there was an encroachment, fencing and annexation of his parcel of land by 2nd Respondent; his course of action or complaint is rooted more in an action for declaration of title, trespass, damages for trespass and injunction to protect his legal rights over the said parcel than any violation of Fundamental Rights.

At the risk of prolixity, there is nothing in the affidavit of Applicant situating a compulsory acquisition or revocation of his plot. If no such case has been made out, any claim for compensation has no basis, factual or legal and will not fly. Any attempt by court to undertake any inquiry into this complaint will amount to a futile exercise.

Any alleged breach of Applicant's Fundamental Rights, if any at all, from the entire processes filed appear to fundamentally be merely accessory to the fundamental complaint of **declaration of title and trespass** over the said **plot 400**. I am in no doubt that the remit of the principal complaint in this case certainly has nothing to do with enforcement or securing of the Fundamental Right of Applicant.

The crux therefore of the complaint of Applicant stripped of the coloration or the designation of the Reliefs in the guise of enforcement of Fundamental Rights for compensation arising from acquisition of property is simply a case of whether on the facts and materials, the 2nd Respondent can encroach and seize the plot of land allocated to Applicant. This then raises the issue of ownership of the land. The

question of ownership of land in the FCT are determined on a set of fairly well settled principles. Same goes for the questions of trespass and injunction.

A claim rooted in these clear defined causes of action cannot constitute the principal reliefs under the Fundamental Right Enforcement Procedure Rules. The writ of summons and pleadings would have been better utilised to ventilate this type of grievance.

The point to underscore and judicial authorities are clear on the position of the law in relation to a claim for enforcement of Fundamental Right. It is to the effect that Enforcement of Fundamental Right or securing the enforcement thereof must form the basis of the Applicant's claim as presented to the court and not merely an accessory claim as the extant case. In other words where the main claim or principal claim is not enforcement or securing of Fundamental Rights, the jurisdiction of the court cannot be properly exercised because it will then be incompetent. See **Tukur V Govt. of Taraba State (1997) 6 NWLR (Pt.510) 549 at 574 – 575; UniIlorin & Anor V Oluwadare (2006) LPELR – 3417 (SC); WAEC V Akin Kunmi (2008) LPELR – 3408 (SC).**

The preliminary objection by 1st Respondent clearly has considerable merit and this case is incompetent and liable to be struck out but in the event I am wrong in so holding, let me now go to the merits and substance of the case and determine the issue earlier raised by court as arising for determination in the substantive application.

ISSUE 1

Whether on the facts and materials before court, the Applicant has established that his Fundamental Human Rights were infringed by Respondents to entitle him to the reliefs sought.

Now it is settled principle of general application that an applicant who seeks for the enforcement of his fundamental rights under **Chapter IV of the Constitution** has the onus of showing that the reliefs he claims comes within the purview of the fundamental rights as contained in chapter IV and this is clearly borne out by the express provision of **Section 46 of the 1999 Constitution and Order 11 Rule 1 of the FREP Rules 2009. In Uzoukwu V. Ezeonu II (1991)6 N.W.L.R (pt.200)708**

at 751, the Court of Appeal in construing **Section 42 of the 1979 Constitution** which is in *pari materia* **with Section 46 of the 1999 Constitution** stated as follows:

"The Section requires that a person who wishes to petition that he is entitled to a fundamental right:

a. Must allege that any provision of the fundamental rights under chapter IV has been contravened, or
b. Is likely to be contravened, and
c. The contravention is in relation to him''.

The reliefs which therefore an applicant may seek under the FREP Rules are specifically limited to any of the fundamental rights prescribed and embodied in chapter IV of the Constitution. See **Dongtoe V. Civil Service Commission Plateau State (2001)19 WRN 125; Inah V. Okoi (2002)23 WRN 78; Achebe V. Nwosu (2002)19 WRN 412.**

I had earlier at the beginning set out the claims of the Applicant. In the preliminary objection resolved above, I had found that a careful consideration of the reliefs clearly do not reveal or show that the main plank of the application is one of the breach of Fundamental Right(s). The breaches, if any at all, appear to be incidental or accessory claims and as a result, I found that the action is incompetent. I had also indicated that out of abundance of caution and in the event I am wrong, I will still consider the action on the merits.

Again, as stated earlier, the 2nd Respondent despite service of the originating court processes and hearing notice did not appear in court and did not file any process.

Let me therefore quickly make the point that generally, the failure of 2nd Respondent to react to the contents of the affidavit of applicant meant that the applicant's affidavit with respect to the averments against 2nd Respondent should be taken as true since it is unchallenged. See **Nwosu V Imo State Environmental Sanitation Authority (1990) 2 NWLR (pt.135) 6877 at 721 and 735**. I am however quick to add that although this is a general rule, it is also true to say that the court is not in all circumstances bound to accept as true, evidence that is un-contradicted where such evidence is willfully or corruptly false, incredible,

improbable or sharply falls below the standard expected in a particular case. See **Neka B.B.B. Manufacturing Co. Ltd V. ACB Ltd (2004) 2 NWLR (pt.858) 521 at 550, 551**.

It equally follows that the fact that an affidavit is unchallenged does not in any way lessen the duty of the court to ensure that the reliefs sought are creditably established. The court has the bounden duty to look at the contents of the unchallenged affidavit to determine if it is sufficient or meets the required standard of cogency and creditably to determine the claim(s) made by the applicant. See **Martchem Ind. Nig. Ltd V M.F. Vent Inest. Arice Ltd (2005) 129 LRN 1896 at 1899.**

It may be apposite to also add that the substance of Reliefs 1 and 2 sought by Applicant on which the other reliefs are predicated are declaratory in nature. That being so, it is critical to state that declarations in law are in the nature of special claims or reliefs to which the ordinary rules of pleadings or processes filed particularly on admissions have no application. It is therefore incumbent on the party claiming the declaration to satisfy the court by credible evidence that he is entitled to the declaration. See **Vincent Bello V. Magnus Eweka (1981) 1 SC 101 at 182; Sorungbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262.**

The point to underscore is that it would be futile when a declaratory relief is sought to seek refuge on the stance or position of the adversary in the process he filed or his failure to call evidence of file any process or even defend the action. The court must be put in a commanding position by credible and convincing evidence at the hearing of the Applicants entitlement to the Reliefs sought as in this case.

The law is settled that the burden was on Applicant alleging that his fundamental rights has been contravened or likely to be contravened to place before the court cogent and credible facts or evidence to enable the court grant the reliefs sought. See **Fajemirokun V. C.B.C.I (Nig) Ltd (1999)10 N.W.L.R (pt.774)95.**

In resolving this dispute, it is central to interrogate and or scrutinize the facts precisely streamlined on the materials supplied and in doing so to determine whether the Applicant has put the court in a commanding height to grant the Reliefs sought. The 1st Respondent as stated earlier challenged the depositions of

Applicant so the contested assertions must then be creditably established on clear legal and factual threshold.

Again at the risk of prolixity and in resolving this dispute. I prefer to take my bearing from the affidavit of Applicant. Paragraphs 1, 2, 4, 9 – 15 are important as follows:

"1. That I am the lawful owner of the property known as Plot No 400 lying and situate within cadastral zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. v1 customary certificate of occupancy in the land administration land registry officer at Abuja.

2. That the 1st Respondent is the authority that allocated the land to me and under shoes jurisdiction that is situate.

4. That I bought the said Plot No 400 lying and situate within Cadastral Zone 04-07 in the Gwagwalada Area Council FCT Abuja with Certificate of Occupancy (Customary) No: FCT/GAC/RLA/ED/400 dated 28th October, 2003 and registered as No: 21228 at page 615 in vol. vi customary certificate of occupancy in the land administration land registry office at Abuja from Mr. Akoji Samuel sometime on the 11th of October, 2010 for a fee of One Hundred Thousand Naira. A copy of the Conveyance of Provisional Approval and Certificate of Occupancy (Customary) is hereby annexed as Exhibit 1.

9. That I paid a visit to the said plot sometime in August, 2019 only to discover that Government Junior Secondary School, Tunga Maje which is under the supervision, management and authority of the 2nd Respondent, has encroached on the plot by completely fencing and annexing it as part of the school plot without authorization or any form of compensation.

10. That a discreet investigation I conducted shows that the said plot was never originally part of the school plot.

11. That as a result of the encroachment by the school I instructed Chidi Akunakwe & Company to write formally to the Respondents to inform them about the recent development but till date they have failed to reply the letter from my lawyer. Copy of the said letter is hereby annexed as Exhibit 4.

12. That my lawyer told me sometime in November, 2019 at about 3pm on phone and I verily believe him that he visited the office of the 1st Respondent to follow up the letter and was informed by the Personal Assistant to the Chairman that the school acquired the property for public use and therefore, there was nothing they could do.

13. That the 1st Respondent under (sic) who allocated the land to me and under whose jurisdiction the land is, is aware of the manner and illegal way my plot was compulsorily acquired from me without my consent or compensation.

14. That at no time did the 1st Respondent inform or notify me of their intention of revoking the said certificate of occupancy granted to me.

15. That I was never aware of the recent encroachment by the 2nd Respondent until late 2019 when a visit was paid to the plot for assessment."

Now the 1st Respondent who Applicant in paragraph 2 of his deposition stated is the authority that allocated the land to him stated in their counter-affidavit as follows:

"2. That I am the Divisional Head of Planning, Lands and Survey Unit of the Respondent attached to the Zonal Lands Office Gwagwalada, Abuja-FCT.

3. That by virtue of my position aforesaid, I am conversant with the facts of this case.

4. That I have the consent and authority of my employer, the Respondent to depose to this Affidavit.

5. **That Respondent has no record of any transaction between the Original Allottee of the land in issues with any person at all.**

6. **That the Respondent did not encroached on the land in issue or acquired same.**

7. **That the land in issue is on ground without any encroachment.**

8. **That the Allottee of the land had never applied and/or granted any development approval for the land in issue.**

9. **That there is no any form of unexhausted improvement on the land in issue."**

The substance of the depositions of 1st Respondent is to completely deny the essence of the case made by Applicant that they compulsory acquired his land or revoked same. If there was thus any compulsory acquisition or revocation of his plot, the burden was on Applicant to prove same. See **Section 131 (1) and (2) and 132 of the Evidence Act**. This he did not do in this case.

Let me however further carefully scrutinize the affidavit of Applicant. By paragraph 9 above, Applicant stated that in August 2019, he discovered that a particular identified school encroached on his land. As stated severally in this decision, the related questions of declaration of title and or trespass as between Applicant and the alleged trespasser is not a matter for enforcement of Fundamental Rights. The present case is no conduit to ventilate such a grievance. They are clearly outside the remit of matters of enforcement of Fundamental Rights. I leave it at that.

Now the key complaints of alleged forceful acquisition, revocation of certificate of occupancy were made vide paragraphs 12 – 15 above. In law, it is one thing to aver material facts as done above, but it is one thing to provide credible evidence to situate and or support the averments particularly here where they are challenged or controverted by the adversary or body accused of the acts complained of.

Let me also add that a court ought to consider the reasonableness of an affidavit or the bona fides, even if not contradicted. Indeed not all averments need be challenged. See **U.B.A Ltd V Stahlabau GMBN & Co KG (1989) 3 NWLR (pt.110) 374 at 399 A-B, D**.

In this case, the very basis of the complaint of Applicant with respect to the complaint of acquisition of property is paragraph 12, which I again prefer to repeat thus:

12.That my lawyer told me sometime in November, 2019 at about 3pm on phone and I verily believe him that he visited the office of the 1st Respondent to follow up the letter and was informed by the Personal Assistant to the Chairman that the school acquired the property for public use and therefore, there was nothing they could do.

In the oral address of counsel to the 1st Respondent, the validity and competence of this paragraph was challenged as hearsay and liable to be struck out for been in violation of the provisions of **Sections 115 (1), (3) and (4) of the Evidence Act** which provides thus:

"115(1): Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

(3) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

(4) When such belief is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstance of the information.

Now I have carefully read the above provisions which appear to me clear and unambiguous. The word **"shall"** clearly appears in the above provisions which in law and in the context in which it appears has a mandatory connotation. The word **"shall"** when used in a statutory provision imports that a thing must be done. It is

a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given compulsory meaning as it is intended to denote obligation. See **Onochie V. Odogwu (2006)6 N.W.L.R (pt.975)65; Nwankwo V. Yaradua (2010)12 N.W.L.R (pt.1209)518.**

In this case, the affidavit of Applicant contains different levels of unacceptable hearsay evidence which generally are inadmissible by **Sections 37** and **38 of the Evidence Act.**

The information by Applicant that his plot was acquired for public purposes was supplied to him by an unknown lawyer on phone who **inturn** was said to have been informed by an unidentified personal assistant to the Chairman of 1st Respondent. It is clear here that the ultimate source of Applicant's information who informed the lawyer that the property was acquired was not named or stated; the reasonable particulars with respect to this informant, the time, place and circumstances of the information was not supplied in clear contravention of the above provision of **Section 115(1), (3) and (4) of the Evidence Act** and this appears to me fatal. The same grave flaws equally applies to the unidentified lawyer who then informed applicant on phone.

The consequences of these clear violations is that it detracts from the credibility and reliability of the averments and will necessarily suffer the consequence of been discountenanced. At the risk of sounding prolix, it is obvious that the depositions in question and referred to above, were facts clearly not traceable to the personal belief of the deponent or Applicant; that is, what he personally saw, heard or knew or experienced with respect to the purported revocation of his plot and generally the precise circumstances of the knowledge of those facts. The facts deposed to therein were clearly founded on "**hearsay evidence"** with no precise identifiable source. There is therefore no positive legal link in proof of the allegations made.

In **Abiodun V. C.J Kwara State (2007)18 N.W.L.R (pt.1065)109 at 144,** the Court of Appeal held as follows:

"By virtue of Section 88 of the Evidence Act, when a person deposes to his belief on any matter of fact and his belief is derived from any other sources,

other than his own personal knowledge, he shall set forth explicitly, the facts and circumstances forming the ground of his belief. Thus the combined reading of Sections 76, 77, 86, 87 and 88 of the Evidence Act is that a deposition in an affidavit must be direct. Where the evidence is derived from another person such person and the circumstances of the knowledge which he believes must be stated so that the court and the other party deposing to contrary evidence can confirm or ascertain the truth."

In **Gov. of Lagos State V. Ojukwu (1986)1 N.W.L.R (pt.18)621,** it was held that an informant must be named, if the deponent is swearing to information given to him by another person; that hearsay in an affidavit is not countenanced, especially if the deponent swears to what he was told by an unnamed person. In **Barclays Bank Ltd V. C.B.N (1976)176,** it was held thus:

"The substance of the affidavit constitutes the evidence before the trial court and its veracity must be ascertainable as the evidence of a witness on oath in the witness box, giving oral testimony. It is not enough to make sweeping statements of facts which are not stated to be within the knowledge of the maker, communicated by unnamed person to the maker."

Again in **Chief Francis Edu V. Comm. for Agric, Water Resources and Rural Development (2000)12 N.W.L.R (pt.681)316 at 333**, the Court of Appeal held thus:

"By virtue of Section 86, 87 and 88 of the Evidence Act, an affidavit must contain only those facts of which the maker or deponent has personal knowledge or which are based on information which he believes to be true and the maker must state the name and full particulars of his information…"

At Pages 332-333, Edozie J.C.A (as he then was) held thus:

"It is not disputed that the facts deposed to in the appellants supporting affidavit by Mr. Mathew Ekpo are not within his personal knowledge."

Again at Pages 334 of the same report, Ekpo J.C.A held as follows:

"Sections 86, 88 and 89 of the Evidence Act, 1990 are mandatory or obligatory and non-compliance is bound to lead to the rejection of the affected paragraphs of the affidavit."

Paragraph 12 of Applicants' affidavit is clearly irredeemably compromised. If this paragraph is knocked off and it is struck out, the case of Applicant with respect to any forceful acquisition or revocation collapses along with the claim for compensation and all other reliefs claimed. See **Joshen Holdings V Lornamead Ltd & Anor (1995) 1 NWLR (pt.371) 254; Saidu H. Ahmed & Ors V C.B.N. (2013) LPELR – 20744 (SC)**. Indeed where evidence consists of hearsay evidence of what the deponent was told by an unnamed person and therefore of a kind not permissible, the court should strike out the offending paragraph or ignore the hearsay evidence in determining the application. See **Barclays Bank V CBN (1976) 1 ANLR (pt.1) 409 at 420**.

In addition, absolutely no supporting document of any kind was attached to situate or show any acquisition or revocation. To further detract completely from the case of Applicant, the 1st Respondent in its affidavit as already alluded to, categorically averred vide **paragraphs 6 and 7 of their Counter-affidavit** that there was no encroachment and that the said plot 400 is on ground without any encroachment. This unchallenged averments further undermines any claim of revocation made by Applicant in paragraph 15 of his deposition. Again, if there was a revocation, where is the evidence that the plot of land was revoked by 1st Respondent? Absolutely nothing was attached to strengthen the credibility of the assertion that there was any revocation. The contention that Applicant was not informed of the intention to revoked clearly has no merit in the circumstances. The entire facts averred by Applicant when taken together or independently are clearly not sufficient to situate compulsory acquisition of Plot 400 or its revocation. Making sweeping or general averments or allegations as done here will not suffice to put the court in a commanding height to grant the reliefs sought here. The Revocation of Rights of Occupancy and compensation are guided by the clear provisions of Sections 28 and 29 of the Land Use Act.

If there is absolutely no evidence situating any acquisition or revocation of any plot of Applicant within the purview of **Section 28 Land Use Act** as in this case, then any discourse of compensation will clearly be an entirely idle or academic exercise

with absolutely no practical utilitarian value of any kind to the grievance presented by Applicant. The entire case of Applicant on acquisition and revocation is not supported by facts or very low on facts but very high on speculations or guess work. As courts of law are not established to adjudicate on speculations but on established facts, such actions, as this one are undermined abinitio and will lack merit in the circumstances.

The bottom line and at that risk of sounding prolix is that the Applicant has not creditably established that there was a compulsory acquisition of his property or a revocation of same. The claim for compensation within the confines of the applicable law thus has no legal basis or foundation. These important issues raised by Applicant cannot be a matter of guess work, conjecture or speculation in proof of infractions of Fundamental Human Rights as alleged. It is not a matter for sentiments and it is equally not a matter for address of counsel however well written or articulated. The entire trial process including the extant proceedings is entirely evidence driven. Cases fall or rise on the quality of evidence put forward to support a particular cause. It is therefore a matter of clear, cogent evidence being proffered putting the court in a commanding height showing or proving that there were indeed infractions. Nothing was established here.

As stated earlier, the Applicant only made unsubstantiated allegations which cannot secure a decision or infractions of Human Rights. I only need to underscore again, the point that the business of court does not include that of speculating. A court of law qua justice only acts or decides on the basis of what has been clearly demonstrated and creditability proved. I must also add that bare averments of infractions in an affidavit as in this case cannot suffice especially where they are seriously controverted or challenged. I do not think that the assertions of applicant can stand or be accepted as correct without proof. The mere stating of a fact does not prove the correctness or credibility of that fact without cogent evidence to substantiate same. In as much as the assertion does not relate to any fact which the court can take judicial notice, it behoves applicant to substantiate same with proof.

The point therefore is that in a fundamental rights enforcement matter, which is a serious matter, the court will not declare an applicant's right(s) to be infringed simply because he says so and in the absence of credible evidence or proof. The materials also supplied by applicant in the circumstances must also not be such that

is incredible, improbable or sharply falls below the standard expected in a particular case. It must establish that the rights claimed exist and has been infringed upon or is likely to be infringed. See **Neka B.B.B Manufacturing Co Ltd. V. ACB Ltd. (2004)2 N.W.L.R (pt.858) 521 at 550 – 551.**

I have here carefully considered the materials before me and I cannot locate any violation of the relevant constitutional provisions. There is absolutely no evidence of such quality and cogency beyond controverted speculative averments showing that the Applicant rights were violated as asserted by him and the conclusion I reach is that the Applicant's narrative lacks credibility and value. I so hold.

It is a fundamental principle of our legal system in respect of facts averred that where they are weak, tenuous, insufficient or feeble, then it would amount to a case of failure of proof. A plaintiff or an Applicant whose affidavit does not prove the reliefs he seeks must fail. See **A.G. of Anambra State V. AG of Fed. (2005) AII F.W.L.R (pt.268)1557 at 1611; 1607 G-H.**

In the final analysis, even on the merit, the case of Applicant would still have failed and the Reliefs would not be availing and the case would have been dismissed.

As stated earlier, I considered the action on the merit out of abundance of caution. Having already found that none of the principal claims which Applicants seeks to enforce can be brought within the provisions of Chapter IV, it meant that the procedure was not available or a proper conduit to ventilate the present grievance, and accordingly this court will have no vires to exercise jurisdiction.

On the authorities, the principle is settled that where a court finds that an action as constituted is incompetent for one reason or the other, the proper order to make is not one of dismissal but striking out. See **Adetunji V Adesokan (1994) 4 NWLR (pt. 346) 540; Okolo V UBN (2004) 13 WRN 62 at 76-77**.

Accordingly, I will and do hereby record an order striking out this suit/action. No order as to cost.

…….
Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Chidi Akunnakwe, Esq., for the Applicant.**

2. **I.G. Haruna, Esq., with A.Y. Zubairu, Esq., and H.I. Apa, Esq., for the 1st Respondent.**