IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISON
HOLDEN AT HIGH COURT MAITAMA – ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	**JAMILA OMEKE & ORS**
COURT NUMBER:	**HIGH COURT NO. 25**
CASE NUMBER:	**SUIT NO. FCT/HC/CV/146/21**
DATE:	**14/7/2021**

BETWEEN:

KASHIM USMAN ALBISHIR.....APPLICANT

AND

(1). HABIBA HUSSAINI USMAN

(2). HIS HONOUR, HON.SURAI MAHDI MUHAMMAD

(3). SULE DANGANA } RESPONDENTS
(THE REGISTRAR, THE GRADE 1 AREA COURT HOLDEN AT WUSE SITTING AT GUDU AREA COURT COMPLEX

(4). CHIEF REGISTRAR (SHARIA COURT OF APPEAL)

APPEARANCES:
F. O. Amedu Esq with Amira Idris Zara Esq for the Applicant.
Ian Solom on Esq holding brief of A. A. Abdulazeez for the 1st Respondent.
Musa Yahaya Esq for the 2nd and 3rd Respondents.

JUDGMENT

The Applicant has brought this Motion on Notice for Judicial review pursuant to obtaining leave of Court via Ex-parte Motion with No. M/13061/2020 dated 15th day of December, 2020 filed same day.

However, in response to this application for > Review, the 2nd, 3rd and 4th Respondents filed a Notice of Preliminary Objection dated 17th day of February 2021 but filed on the 19th day of February 2021.

Now, considering the nature of a Preliminary Objection, it is pertinent that it be considered first.

The said Notice of Preliminary Objection is predicated on the following grounds:

(1). That the suit subject of this application involves question of Islamic personal law which by virtue of Section 262 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended).

(2). That the action constitutes abuse of the processes of this Honourable Court.

(3). That the action is statute barred and contrary to the provision of Sect 2(a), Public Officers Protection Act.

(4). Non-compliance with Order 44 Rule 4, High Court of the Federal Capital Territory (Civil Procedure) Rules, 2018.

The Reliefs sought are as follows: -

(1). An Order striking out the suit on ground of lacks of jurisdiction to hear and determine the suit.

(2). An Order dismissing the suit for constituting abuse of the processes of the Court.

(3). Any other Orders the Court may deem fit to make in the circumstance.

Filed in support of the Preliminary Objection is a Written Address wherein the learned Counsel distilled three issues for determination:

In issue one which is whether the Applicant's application for certiorari in view of his pending appeal against same party and subject matter

constitutes abuse of the process of the Honourable Court, Counsel answered the question in the affirmative and stated that commencing certiorari proceedings while an appeal is pending to nullify the same decision of same Court and between the same parties is an abuse of Court process. Reliance as placed on the case of ***A.C.B. V NWAIGWE (2000) 1 NWLR (Pt. 640) 201 at 203.***

Therefore, Counsel stated that in the instant case, the Applicant not being satisfied with order of the Area Court (Grade 1) of the Federal Capital Territory, delivered by Hon. Suraj Mahdi Muhammed on the 6th and 10th day of October 2020 had appealed against same to the Sharia Court of Appeal of the Federal Capital Territory since on the 19th day of October, 2020. That the application for certiorari was filed against a valid and subsisting appeal duly entered with Appeal No. SCA/FCT/CV/68/2020 at the Sharia Court of Appeal of the Federal Capital Territory.

Consequently, Counsel submitted that commencing certiorari proceedings while an appeal is pending to nullify the same decision of same Court and between the same parties is an abuse of Court process and urged the Court to so hold.

Finally on issue one, Counsel referred the Court to the case of ***ANIBO V AIYELERU (1993) 3 NWLR (Pt. 280) P. 186*** and urged the Court to dismiss the Applicant's application with substantial cost.

On issue two which is whether the Honourable Court is competent to hear and determine Suit No. CV/146/2021 in view of the provision of Section 262(1) and (2) Constitution of the Federal Republic of Nigeria 1999 (as Amended), Counsel stated that both High Court of the Federal Capital Territory and the Sharia Court of Appeal of the Federal Capital Territory derive their jurisdiction from and is created by the Constitution of the Federal Republic of Nigeria, 1999 (as Amended). Counsel referred the Court to Sections 257(1) and (2) and Section 262(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria (as Amended).

It is the contention of the learned counsel that the gamut of the entire event subject matter of this application was dissolution of marriage conducted under Islamic Law Practice and procedure alongside the consequential Orders of the 6th and 10th day of October 2020 was orders made pursuant to Islamic personal law, thus, purely of Islamic personal law.

Therefore, Counsel submitted that the High Court of the Federal Capital Territory is not competent to hear and determine the suit (either in its original appellate or supervisory jurisdiction) as it borders on matters of Islamic personal law, it is the Sharia Court of Appeal of the Federal Capital Territory that is constitutionally vested with appellate and supervisory jurisdiction in civil proceedings involving such questions of Islamic personal law.

In a similar submission, Counsel stated that the Constitution clothes the Sharia Court of Appeal of the Federal Capital Territory with jurisdiction over civil proceedings involving questions of Islamic personal law.

Finally on issue two, Counsel urged the Court to exercise restraint and sustain the submission that the High Court of the Federal Capital Territory, lacked the jurisdiction to entertain civil proceedings involving questions of Islamic personal law.

On issue three which is whether having regards to the totality of facts and Order 44 Rule 4 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 the Honourable Court can assume jurisdiction to entertain the Applicant's suit in Suit No. CV/146/2021 filed on the 20th day of January 2021 as same is said to be statute barred. Counsel referred the Court to Section 2 of Public Officers Protection Act and Order 44 Rule 4 of the Rules of this Court and submitted that it is trite law that where a statute provides for the institution of an action within a prescribed period, proceedings shall not commence after the time prescribed by such statute. That any action that is brought after the prescribed period is said to be statute barred. Reliance was placed on the case of ***N.R.M.A & F.C V JOHNSON (2019) 2 NWLR (Pt. 1656) 247 at 253 ratio 9.***

Therefore, Counsel stated that the Applicant's action in Suit No. CV/136/2021 filed on the 20th day of January 2021 was against an Order of the 6th and 10th day of October 2020. He contended that the action was commenced after the time prescribed by statute, in a period of over three months against a Public Officer who acts in good faith in the course of discharging his judicial function.

Consequently, Counsel submitted that the Applicant's application is statute barred for non-compliance with mandatory provisions of Section 2(a), Public Officers Protection Act and Order 44 Rule 4 of the High Court of the

Federal Capital Territory (Civil Procedure) Rules 2018. Reliance was placed on the case of ***OUR LINE V S.C.C. NIGERIA (2019) 7 S.C.N.J.***

In another submission, Counsel stated that where there is no jurisdiction, no Court under any guise can confer one upon itself. Reference was made to the cases ***MANDARA V ATTORNEY-GENERAL OF THE FEDERATION (1984) 1 SCNLR 311, ADESINA V KOLA (1993) 6 NWLR (Pt. 298) 182, BOYI V HASSAN (2001)18 NWLR (Pt. 744) page 41 at 43.***

It was further submitted that where a Court acted without jurisdiction, its decision, rulings and judgments reached are null, void and of no effect. That any defect in the competent of the Court is fatal and the proceedings are a nullity. Reliance was placed on the cases of ***ASOGWU V CHUKWU (2003) 4 NWLR (Pt. 811) P. 440 at 580, 581 and 591; MADUKOLY V NKEMDILIM (1962) 1 SCNLR 341.***

Therefore, Counsel urged the Court to resolve all issues against the Applicant in the best interest of justice and the subject. Finally, Counsel urged the Court to hold that the Applicant's application is lacking in merit and to dismiss same with substantial costs.

In response to the Preliminary Objection, the learned SAN Abdul Mohammed submitted that the application is incompetent because its success depends on presenting the Court with the Notice of Appeal which is before the Sharia Court of Appeal.

That the application is not supported by any Affidavit exhibiting the Appeal. He cited the cases of ***WILLIAMS & ANORS V HOPE RISING VOLUNTARY SOCIETY (1982) ANLR 1 (1982) 1 -2 SC; KEYAMO V HOUSE OF ASSEMBLY LAGOS STATE (2002) KEL.1 55613 (SC).***

On the issue of jurisdiction learned SAN referred the Court to Order 44 of the Rules of this Court and stated that this Court's jurisdiction under judicial review is over all inferior Courts, all tribunals including the Respondent in this case. Therefore, the learned silk urged the Court to discountenance the application.

On the time limitation, the learned SAN stated that it is one that must be properly situated in an affidavit, that it is not the learned Counsel to the

Defendant/Applicant to stand at the bar and canvass, evidence, if he wanted to do that, he can do so by affidavit.

Finally, learned silk urged the Court to dismiss this application as a judicial waste of time.

In his reply on points of law, Applicant's Counsel Musa Yahaya Esq stated that on the Notice of Appeal, it is before the Court and they rely on presumption of law and urged the Court to discountenance the entire submission of the learned silk.

On his part, Counsel to 1st Respondent A. A. Hafiz Esq stated that they have no objection to the Preliminary Objection.

I have perused carefully the Notice of Preliminary Objection, the grounds upon which same was predicated, the reliefs sought and the Written Address in support. I have equally considered the oral reply in opposition to the Preliminary Objection by the learned silk and the reply on points of law.

It is therefore my humble view that the issue for determination is whether this Preliminary Objection is sustainable.

It is the case of the Respondents/Applicants that this application for certiorari is an abuse of Court process because the Applicant/Respondent has appealed against the Ruling of the Area Court. However, the Respondents/Applicants did not annex or exhibit the Notice of Appeal to that effect.

In that respect, it is trite law that whoever asserts must prove with credible and admissible evidence. This position of law was encapsulated in Section 131(1) of the Evidence Act 2011 (as Amended) which provides thus:

> ***"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

The law is equally settled that Court of law must rely on facts and evidence before it and not on speculation. This was reinstated in the case of ***ZABUSKY V ISRAIL AIRCRAFT IND. (2008) 2 NWLR (Pt. 1070) 133 at 137, paras F –G*** where it was held thus: -

"Courts are not given to speculation, they act on evidence..."

Similarly, it was held in ***N.B.C.I V AL-FIDR (NIG) LTD (1993) 4 NWLR (Pt. 197) at 346*** that:

"It is settled law that a Court can only act on the basis of the evidence placed before it..."

In view of the foregoing, the Applicants as stated earlier did not exhibit anything to show that the Applicant/Respondent has an appeal pending before Sharia Court of Appeal Abuja, this Honourable Court therefore cannot speculate or act on what is not placed before it. I so hold.

Furthermore, on the learned Applicant's Counsel's submission that this Honourable has no jurisdiction to entertain this application for judicial review, I refer to Order 44 Rule 3 sub-Rule 1 of the Rules of this Court (Civil Procedure) Rules 2018. For ease of reference, I shall reproduced same hereunder. It provides thus: -

"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule..."

From the wording of the Rules of this Court quoted above, the words used therein are "leave of the Court". It does not go further to specify which Court. Therefore, it is settled principle of law that where the words used in a statute or document is clear and unambiguous effect must be given to same. This position of law was re-echoed by the Supreme Court in the case of ***OKOTIE EBOH V MANAGER (2005) 2 MJSC*** where it was held that: -

"...Where the ordinary plain meaning of words used in a statute are clear and unambiguous effect must be given to those words without resorting to any intrinsic or external aid."

At this junction, it should be noted that the essence or purpose of certiorari is to control inferior Courts or tribunals where they exercise their mandate or jurisdiction wrongly. In support of this, I refer to the case of ***PROF. LOUIS CHELUNO NWAOBOSHI & ORS V THE MILITARY GOVERNOR***

OF DELTA STATE & ORS (2003) LPELR – 2113 (SC) per Uwaifo J.S.C at P. 10, paras F – G where it was held that: -

> ***"That the Writ is issued in Order that the issuing Court may bring the proceedings of the inferior tribunal or Court before it for inspection and if there is due cause disclosed to quash them..."***

In the light of above, it is my considered opinion that this Honourable Court from the Rules referred above and also being a Court of superior record has unfettered jurisdiction to hear and determine an application for judicial review. I so hold.

On that note, the submission of the learned Counsel to the Respondents/ Applicants is hereby discountenanced.

In another submission, learned Counsel to the Respondent/Applicant stated that this application for judicial review is statute barred as the Applicant/ Respondent did not file same within the time allowed by law. Reference was made to Section 2(a) of the Public Officers Protection Act and Order 44 Rule 4 of the Rules of this Honourable Court.

However, I have aligned myself with the submission of the learned silk that the Respondents/Applicants need to deposed to an affidavit on that fact as the issue of statute bar is a fact which the learned Counsel cannot supply the Court through a Written Address. In that respect I refer to the case of ***AMAH V NWANKWO (2017) NWLR (Pt. 1049) 552 at 578, Para A – C,*** where it was held thus:

> ***"A Preliminary Objection may or may not be supported by affidavit. It depends on what is being objected to if the Preliminary Objection is a law, an affidavit is not necessary if it is in facts, an affidavit is mandatory. In the other words where a Preliminary Objection strictly deals with law, for instance an objection that Court process has not been complied with or that a suit is an abuse of process there is no need for supporting affidavit but the grounds of the objection must be clearly stated. But when a Preliminary Objection moves from law to facts of the case the party relying on the Preliminary Objection must justify the fact by filling an affidavit..."***

On that note, I hereby discountenance that submission of the learned Respondents/Applicants' Counsel.

In the final analysis therefore, I without hesitation resolve the issue for determination in favour of the Applicant/Respondent against the 2nd - 4th Respondents/Applicants and hold very strongly that this Preliminary Objection is not sustainable. Consequently, the Preliminary Objection lacks merit and same is hereby dismissed in its entirety.

The next to be considered is a Motion on Notice with Motion No. M/471/2021 dated 16th day of February 2021 and filed on 17th February 2021. The motion is brought pursuant to Section 6 of the 1999 Constitution as Amended and Order 43 Rule 1(1) and (2) of the High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of the Honourable Court.

The Respondent/Applicant herein prayed this Honourable Court for the following reliefs: -

(1). An Order of this Honourable Court setting aside the leave granted to the Applicant/Respondent on the 19th day of January 2021.

(2). And for such further Order or Orders as this Honourable Court may deem fit to make in the circumstance.

The application is predicated upon the following grounds: -

(1). The application for leave for judicial review is an abuse of Court process. The Applicant having appealed against the same rulings against which a judicial review is sought at the Sharia Court of Appeal F.C.T.

(2). The leave was obtained by fraud.

(3). The Court was misled into granting the application.

In support of the application is a 17 paragraphed affidavit deposed to by one Gbenga Adebiyi, a litigation secretary in the law office of Alqist Legal

Consult attached to the affidavit an annexures marked as Exhibit H1 to H 12 respectively. Also filed in support of the motion is a Written Address dated 16th day of February 2021.

In the said Written Address, learned Counsel to the Respondent/Applicant formulated two issues for determination to wit:

> ***(1). Whether it is an abuse of Court process to bring an application for leave for judicial review during the pendency of an appeal on the same issues.***
>
> ***(2). Whether this Honourable Court has the inherent powers to set aside its Order of 19th January 2021 same having been obtained by fraud.***

In arguing the issue, Counsel submitted on issue one referring the Court to the expositions in the Affidavit and stated that the Applicant/Respondent has filed an appeal No. SCA/FCT/CV/68/2020 before the Sharia Court of Appeal FCT against the Orders of 6th and 10th October 2020, a fact deliberately withheld to mislead the Court into granting the leave.

The learned Counsel submitted further that the attitude of the Applicant/ Respondent has amounted to an act of gross abuse of Court process and that a proceeding for judicial review cannot be initiated during the pendency of an appeal. Reliance was placed on the case of ***ADEBIYI V ADEBIYI (2018) LPELR (CA).***

Consequently, Counsel urged the Court to hold that the application for leave was an abuse of Court process and same is liable to be set aside.

In his final submission on issue one, Counsel stated that it is the duty of the Court to protect its processes from being abused. In this respect, Counsel cited the case of ***EBHONU V. EBHONU (2017) ALL FWLR (Pt. 917) Page 1607 at 1610.***

Therefore, Counsel urged the Court to set aside the Order granted by this Honourable Court on the 19th January 2021.

On issue two, Counsel submitted that this Honourable Court has the inherent powers to set aside its own decision if it became clear that same

was obtained by fraud or there was a fundamental defect in the proceedings. He cited in support the case of ***EXXON MOBIL CORP 5959 V. ARCHIANGA (2019) ALL FWLR (Pt. 980) Page 689 at 695 ratio 6.***

In another submission, Counsel stated that where it becomes evident that a Court was misled into reaching a decision that the decision was obtained by fraud, the Court has the inherent powers to set it aside. In this respect, Counsel cited the case of ***FASHOYIN V. ABAYOMI (2018) ALL FWLR (Pt. 920) Page 159 at 163 ratio 4.***

Finally, Counsel urged the Court to grant the application and set aside the leave granted to the Applicant/Respondent on the 19th January 2021 in the interest of justice.

In opposition to the Motion on Notice, the Applicant/Respondent filed a Written Address dated and filed 26th day of February 2021. Wherein the learned silk formulated a lone issue for determination to wit: -

> ***Whether the process of the Defendant/Applicant does not amount to an abuse of Court process.***

In arguing this issue, Counsel submitted that when an application by a party is an abuse of Court process it is ridicule before the Court, and as such good for nothing before the Court and deserving of an Order of dismissal by the Honourable Court. Reliance was placed on the case of ***LOKPOBIRI V OGOLA (2016) 3 NWLR (Pt. 1499) 328 at 388, para E – F.***

Moreso, on what an abuse of Court process means, Counsel relied on the case of ***OYEYEMI V OWEYE (2017) 12 NWLR (Pt. 1580) page 364 – 398, paras D – D.***

Consequently, Counsel referred the Court to the Respondent/Applicant's prayer in the Motion on Notice filed on the 17th of February 2021 and the prayer of the Respondent/Applicant in the Counter Affidavit filed before this Honourable Court on the 2nd February 2021 in response to the application for judicial review by the Applicant/Respondent and stated that no difference between the prayer of the Respondent/Applicant in the Counter-Affidavit and in the Motion on Notice.

In addition, Counsel stated that the depositions in the Counter Affidavit and the Affidavit in support of the Motion filed by the Respondent/Applicant are similar save a few trifling and inconsequential moderations.

To this end, Counsel contended that the action of the Respondent/Applicant in filing multiple processes before this Honourable Court praying this Honourable Court for the same relief is an abuse of Court process and urged the Court to so hold. Counsel cited the case of ***NIGERIAN GENERAL INSURANCE V BELLO (1994) 1 NWLR (Pt. 319) 207 at 221, para D – E.***

Therefore, Counsel urged the Court to dismiss the Motion on Notice filed on the 17th February 2021 for being an abuse of Court process with cost.

I have carefully perused the Motion on Notice, the reliefs sought, the grounds upon which same was predicated, the supporting affidavit, the annexures attached therewith and the Written Address in support. I have equally gone through the Written Address filed in opposition to the motion. It is therefore my humble view that the issue for determination is whether this Motion on Notice filed is an abuse of Court process.

First and foremost, an abuse of Court process is defined by Black's Law Dictionary, Ninth Edition at page 11 to mean thus: -

> ***"The improper and tortuous use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process scope"***

It was given judicial definition in the case of ***AJUWA V SPDC (NIG) LTD (2008) 10 NWLR (Pt. 1094) P. 91 at paras D – E*** that:

> ***"An abuse of Court process exist when a party deliberately uses, employs, or initiates a Court process or multiplicity of the judicial process to the frustration, irritation, and annoyance of his opponent such as instituting multiplicity of actions on the same subject matter between the same parties or their privies on the same issue..."***

See also the case of ***CON OIL PLC V VITOL S. A (2012) 2 NWLR (Pt. 1283) P. 90-91, paras G – E.***

In the instant case a careful perusal of the Motion on Notice and the reliefs sought therein vis-a-vis the 1st Respondent/Applicant's Counter Affidavit and Written Address in opposition to the application for judicial review filed by the Applicant/Respondent will show that they are one and the same. In other words, the main ground upon which the Motion on Notice was predicated is that there is a pending appeal on the Rulings against which a judicial review is sought at the Sharia Court of Appeal FCT, which was already deposed in the said Counter Affidavit and extensively argued in the Written Address in support of the Counter Affidavit.

Be that as it may therefore, this Motion on Notice which was later filed after filing the Counter Affidavit in opposition to the application for judicial review, to say the least, is unnecessary and of no moment.

In that respect and without further ado, it is my considered opinion in view of the foregoing that the Motion on Notice with motion number M/471/2021 filed by the 1st Respondent/Applicant is an abuse of Court process. I so hold.

To that extent, I refer to the case of ***LASSCO ASS. PLC V DESRVE SAVINGS AND LOANS LTD (2012) 2 NWLR (Pt. 116), paras D – E*** where it was held thus: -

> ***"....Abuse of Court process includes improper use of legal process and abuse of procedure .What the Court will do where its process is abused is to dismiss the suit...."***

In the circumstances therefore, I hereby resolve the issue for determination in favour of the Applicant/Respondent against the 1st Respondent/Applicant and hold very strongly as held earlier that the said Motion on Notice is an abuse of Court process and is hereby dismissed in its entirety for lacking in merit. No Order as to cost.

The next to be considered is the application for judicial review.

The Applicant filed a Motion on Notice for judicial review which is brought pursuant to Order 44 Rule 3 of the High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of this Honourable Court. As prescribed under Section 6(6)(b) of the 1999 Constitution (as Amended).

The Applicant herein prayed this Honourable Court for the following reliefs: -

(1). An Order of this Honourable Court granting the application for judicial review of the proceedings in respect of the suit No. TR/CV/35/2020_between Habiba HUssaini Usman and Kashim Usman Albashir pending before His Honour, Hon. Suraj Mahdi Muhammed, the Grade 1 Area Court Holden at Wuse Convening at Gudu Area Court Complex and bringing unto this Court for the purpose of quashing the proceeding in Suit No. TR/CV/35/2020 between Habiba Hussaini Usman and Kashim Usman Albashir pending before His Honour, Hon. Suraj Mahdi Muhammed, the Grade 1 Area Court Holden at Wuse Convening at Gudu Area Court Complex by an Order of certiorari.

(2). An Order of perpetual injunction restraining either or all of the Respondents, their agents, and/or privies from giving effect to any of the Orders contained in the enrolled Order dated 6th October 2020 and 10th October, 2020 pending the hearing and determination of this suit.

(3). An Order of this Honourable Court directing the 2nd, 3rd and 4th Respondents to deposit the sum of One Million Naira (N1, 000, 000.00) being the monies extorted from the Applicant on pain of threat of imprisonment by the 2nd Respondent 30th November 2020 made vide transfer to the account of 3rd Respondent maintained in Polaris Bank Plc.

(4). And for such further Order(s) this Honourable Court deem fit to make in the circumstance.

The grounds upon which the reliefs are sought are as follows: -

(1). The Order of 6th October 2020 was given on the premise of a case that is distinct from the current case without any justifiable reason known or permissible in law.

(2). The Order of the 6th October 2020 contains a retrospective Order which no Court has power to make.

(3). The Order of 6th October 2020 was given without jurisdiction as there is nothing to show that the Applicant was put on Notice of the hearing of the day's proceedings.

4. The Order of 10th October 2020 was given in absolute breach of the right to fair hearing of the Applicant.

Filed in support of the application is the Statement wherein name, and description of the Applicant are contained together with the facts upon which the application is made. Also filed is 25 paragraphs affidavit in support of the Motion on Notice for judicial review deposed to by Kashim Albashir the Applicant in this suit. Attached to the supporting affidavit are annexures marked as Exhibits Albashir 1 to 6 respectively as well as H1 to h4 respectively.

Equally filed in support of the application is Written Address dated 20th day of January 2021. In the said Written Address, learned Counsel to the Applicant formulated three issues for determination to wit: -

(1). Whether Court can validly make Orders retrospectively with respect to Exhibits Madyon 1 and 2.

(2). Whether Orders can be validly made when in breach of a party's fair hearing.

(3). Whether an action taken on Order made in breach of a party's fair hearing can be validly set aside.

In opposition to the application for judicial review, the 1st Respondent filed 18 paragraphs Counter Affidavit which was deposed to by one Gbenga Adebiyi, a Litigation Secretary in the Law Firm of Alqist Legal Consult, Counsel to the 1st Respondent. Attached to the Counter Affidavit are annexues marked as Exhibit H1 to H9 respectively.

Also filed in opposition is a Further Affidavit of 13 paragraphs deposed by the same Gbenga Adebiyi.

The 1st Respondent equally filed in support of the Counter Affidavit a Written Address dated 1st day of January 2021 wherein learned Counsel to the 1st Respondent formulated a lone issue for determination which is whether an application for judicial review can be granted during the pendency of an appeal on the same issues.

In response, the Applicant filed a Reply Affidavit of 11 paragraphs deposed to by Kashim Albashir, the Applicant in this suit. Also filed is a reply on points of law dated 10th day of February 2020.

I have considered the application for judicial review, the reliefs sought, the grounds upon which same was predicated upon, the Statement in support, the Supporting Affidavit, the annexures attached therewith and the Written Address in support. I have given due consideration to the 1st Respondent Counter Affidavit and Further Affidavit in opposition to the application, the annexures attached to the Counter Affidavit and the Written Address. In a similar view, I have perused the Applicant Reply Affidavit and the reply on points of law to the Counter Affidavit.

Therefore in my humble view, the issue for determination is whether the Applicant herein has made out a case for the grant of this application.

It should be noted at the onset that the Applicant herein prayed this Honourable Court inter alia for the judicial review of the proceeding in respect of the Suit No. TR/CV/35/2020 between Habiba Hussaini Usman and Kashim Usman Albashir pending before His Honour, Hon. Suraj Mahid Muhammed, the Grade 1 Area Court Holden at Wuse Convening at Gudu Area Court Complex, and bringing into this Court for purpose of quashing the proceedings in Suit No. TR/CV/35/2020 between Habiba Hussaini Usman and Kashim Usman Albashir pending before His Honour, Hon. Suraj Mahid Muhammed, the Grade 1 Area Court Holden at Wuse Convening at Gudu Area Court Complex by an order of certiorari.

It is elementary that an Order for certiorari is of common law origin and directs for the removal of a certified record of a particular case tried in an inferior Court or other person or body exercising judicial/quasi judicial functions for the purpose of being quashed.

Moreso, the purpose for which an Order of certiorari is sought is to enable the proceedings in the inferior Court or Tribunal to see whether its Order

has been made within jurisdiction. In this respect, I refer to the case of ***JUDICIAL SERVICE COMMISSION OF CROSS RIVER STATE & ANOR V. YOUNG (2013) LPELR-20592 Page 38-39, paragraphs E – E, Per Fabiyi JSC*** held thus:-

> ***"Certiorari is one of the prerogative writs whose main function is to ensure that inferior Courts or anybody entrusted with performance of judicial or quash judicial functions keeps within the limits of the jurisdiction conferred upon them by statute which creates them. Therefore, an Order of Certiorari will lie to remove into the High Court for purpose of being quashed any Judgments, Orders, Convictions or other proceeding of such inferior Court or Body civil or criminal made without or in excess of jurisdiction..."***

In addition, the Court of Appeal has this to say on the purpose of certiorari in the case of ***AGORUA & ORS V OBIORA & ORS (2013) LPELR – 22056, Page 25, paragraphs A – C*** that:-

> ***"It is settled law that certiorari has to the High Court to quash the Orders or the proceedings of an inferior Tribunal which has acted in excess of its jurisdiction and that although the remedy was in early times limited to Courts in the normal way it has since extended to other authorities or bodies exercising judicial or quasi judicial powers..."***

In a similar vein, on the grounds on which Order of Certiorari will lie, the Court held in the case of ***EFUREBE V UGBAMI (2010) 4 NWLR (Pt. 1213) 257 at 291, paragraphs G – F*** that:

> ***"...Some of the established grounds of which Certiorari will lie to quash the decision of an inferior tribunal includes the following:***
>
> ***(a). Want or excess of jurisdiction***
>
> ***(b) . Breach of fair hearing..."***

And according to Nwadialo F. (Civil Procedure in Nigeria) at Page 1056, the other grounds are:-

"(1). Error of law on the face of the record; or

(c). That the decision has been obtained by fraud or collusion".

However before I proceed, it is important to clear the issue raised by the 1st Respondent as deposed in their Counter Affidavit and submitted in their Written Addresses. The 1st Respondent deposed in their Counter Affidavit to the application particularly at paragraph 10 and I shall reproduce it hereunder for ease of reference: -

"That the Applicant has filed an Appeal No. SCA/FCT/CV/68/2020 before the Sharia Court of Appeal FCT against the Rulings of the Grade 1 Area Court delivered on the 6th and 10th October 2020. The same rulings in respect of which judicial review is being sought, the Notice of Appeal filed by the Applicants/Respondents is hereby attached and marked Exhibit H7."

On the other hand, the Applicant deposed in his Reply Affidavit particularly at paragraph 4 thus:

"Contrary to the representation in paragraph 10 of the Counter-Affidavit the Applicant never filed any Notice of Appeal before the Sharia Court of Appeal in respect of the Order of 6th October 2020 and 10th of October 2020 which application for judicial review is before this Honourable Court. What was appealed were the decision of 12th October 2020 and 19th of August 2020."

In addition, the 1st Respondent deposed in the Further Affidavit in opposition at paragraph 9 that: -

"The paragraph 4 of the Applicant's Reply Affidavit is false as the same ruling of 6th October is the one dated on 12th October 2020"

Similarly, counsel to the 1st Respondent submitted in his Written Address particularly paragraphs 3.1.and 3.2 that the Applicant has filed an appeal No. SCA/FCT/CV/68/2020 pending before the Sharia Court of Appeal

against the Orders of 6th and 10th October 2020 and that the attitude of the Applicant has amounted to an act of gross abuse of Court process.

To begin with, the law is settled that where there is an appeal against a judgment or ruling, an application for certiorari to quash that judgment or ruling is an abuse of Court process. This position of law was reinstated in the case of ***INDABAWA & ORS V INDABAWA (2019) LPELR – 48094 (CA) at page 12-16, paras B – D.*** Where it was held thus:

> ***"...Specifically with respect to an application for certiorari when there is a pending appeal, the Court held, per the same learned jurist... an appeal is an alternative remedy for an Order of certiorari...you cannot have both at the same time or one after the other. You must choose between the two... The position of law is that where two processes are pending in this instance, an appeal against the judgment of the Court and an application for certiorari to quash that judgment, the subsequent suit for certiorari will be an abuse of Court process..."***

See also the cases of ***SALIHU V CHIBI & ORS (2017) LPELR-44999 (CA); ARIOLU V ARIOLU & ORS (2020) LPELR – 2947 (CA).***

At this juncture, it is pertinent to examine carefully the Exhibits before the Court. An x-ray of exhibit H7 which is titled Notice of Appeal attached to the Counter Affidavit will show that there is an appeal against two rulings to wit:

(1). Ruling dated 12th October 2020

(2). Ruling dated 19th October 2020.

Moreso, a careful examination of Exhibit H8 attached to the Counter Affidavit particularly at pages: 22, 23, 24 and 25 will show that the ruling dated 12th October 2020 which was appealed against to the Sharia Court of Appeal FCT was delivered on 6th October 2020.

Similarly, a careful perusal of Exhibit Albashir 2 will reveal that the Orders contained therein were emanated from the ruling delivered on 6th October 2020 which was appealed against to the Sharia Court of Appeal, FCT by the Applicant.

From the above analysis, the Order dated 12th October 2020 which is the subject matter of this application for judicial review was predicated upon the ruling delivered on 6th October 2020 and same was already appealed against and the appeal is pending before the Sharia Court of Appeal FCT. I so hold.

At this juncture, having pointed out above that there is already an appeal pending in this suit before Sharia Court of Appeal, FCT, this application for judicial review is an abuse of Court process. I so hold.

In view of the foregoing, I cannot proceed from this stage but to hands off for the Sharia court of Appeal FCT to determine the pending appeal before it.

Consequently, I refer to the case of ***LASSCO ASS. PLC V DESERVE SAVINGS & LOANS LTD (supra) at page 116, paras D – E*** where it was held inter alia that:

> ***"...What the Court will do where its process is abused is to dismiss the suit..."***

To this end, and without further ado, I hereby resolve the issue for determination in favour of the 1st Respondent against the Applicant and dismiss the application for judicial review in its entirety for the reasons given earlier. No order as to cost.

Signed:

Hon. Justice Samirah Umar Bature
14/7/2021