

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT, ABUJA  
BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS  
COURT:28  
DATE:10<sup>TH</sup> February, 2022**

**SUIT NO: FCT/HC/GWD/CV/70/2021**

**BETWEEN**

**1. AL –AMEEN ABU- HAMISU }  
2. ABDULLAH ABU HAMISU } **COMPLAINANTS**  
3. MARYAM ABU- HAMISU }**

**AND**

**1. HAJIA HAUWA MOHAMMED }  
2. ABDULRAHMAN ABU- HAMISU } **DEFENDANTS****

**JUDGMENT**

The 1<sup>st</sup> Defendant brought a notice of preliminary objection number M/79021/2021 dated and filed on the 12<sup>th</sup> of November, 2021 on the following ground(s):-

1. That the matter before the Court is res judicata as the Upper Area Court Gwagawlada has pronounced on the custody of the Claimants.
2. That the Claimants are deemed privies to the action litigate before the Upper Area Court Gwagwalada and cannot bring a fresh action before this Honourable Court for a matter judicially settled.
3. All the Claimants are minors as none of them is up to the age of maturity.
4. The Claimants being minors can only bring an action in the name of their guardian and next friend.

5. The affidavit in support of the originating summons is grossly defective and offends the rule of evidence and rules of professional conduct for legal practitioners.
6. The action open to a party dissatisfied with the outcome of litigation is to go on appeal or apply to the same Court to set aside the judgment.
7. This suit as presently constituted is a gross abuse of the process of this Honourable Court.
8. The present suit is incompetent and ought to be struck out and/or dismissed with substantial cost.

By a 14 paragraph affidavit deposed to by the 1<sup>st</sup> Defendant herself deponent avers inter alia that she is the maternal grandmother of the Claimants who are minors all under the age of 10.

That the Sharia law which her late daughter, the 2<sup>nd</sup> Defendant and herself (1<sup>st</sup> Defendant) are all subject to as Muslims spells out in clear terms the order of persons entitled to the custody of a child.

That deponent filed a suit at the Upper Area Court Gwagawalada in suit No. CV/07/2020 for custody of the claimants and got judgment.

That consequently, the 2<sup>nd</sup> Defendant is aggrieved with the decision of the Upper Area Court and is seeking to re-litigate the matter using the Claimants as a guise.

That the present suit runs contrary to the principle of estoppels per rem judicate.

That the cause open to one dissatisfied with the judgment of Court is to appeal against same.

That the claimants as minor cannot bring this action in their names except through their next friend or guardian al litem.

That the present suit smacks of flagrant abuse of the process of the Court.

In her written address the Counsel to the 1<sup>st</sup> Defendant submits three issues for determination viz:-

“Whether or not by virtue of the case in suit No Cv/07/2020 before the Upper Area Court Gwagwalada between Hajia Hauwa Mohammed and Abdurahman Abu- Hamisu and the judgment delivered herein on 12<sup>th</sup> January, 2021 the present action runs contrary to the principle of estoppels per rem judicata.

2. Whether or not this action is incompetent for want of proper parties before the Court as the Claimants, being minors are not competent to sue in their name.

3. Whether or not this suit is an abuse of the process of the Court and amounts to forum shopping.

On the first issue, Counsel on behalf of 1<sup>st</sup> Defendant relying on ***SKYBLIND (NIG) LTD V NEWLIFE CO-OPERATIVE SOCIETY (2020) 9 NWLR (PT. 1730) 541 at 564 paragraph E-G and PAM V. INC TRUSTES, THE ASSEMBLIES OF GOD NIG 14 NWLR (PT. 1745) 393 at 398 ratio 3.***

Submits that suit CV/07/2020 which was determined between the same parties over the same subject matter in respect of the custody of the children and seeking the same relief is res judicata.

That the doctrine of estoppels per rem judicata does preclude only parties to an action from re-litigating their case under any guise. It also operates against agents, servants, representatives and privies to the action.

That the plea of res judicata operates not only as against the parties but also against the jurisdiction of the Court itself and robs the Court of its jurisdiction to entertain the same cause of action on the same issue previously determined by a Court of competent jurisdiction. See ***UGO V. UGO (2017) ALL FWLR (pt. 902) 903 at 909 ratio 7.***

On issue two, Counsel on behalf of 1<sup>st</sup> Defendant submit that persons under legal disability may sue or defend by their guardians or a guardian appointed for that purpose. Relying on order 13 Rule 11 High Court of the FCT Civil procedure) rules 2018.

***SOFOLAHAN & ANOR V FOWLER & SONS (2002) 4 NWLR (pt 788) 664 at 684 -685*** Counsel states that going by the Supreme Court decision the proper way to bring this action was to state the name of the infant. Indicating him/her to be such and then state he/she is suing through the next friend.

Counsel urged the Court to hold that this suit is incompetent and liable to be struck out.

On issue three, Counsel on behalf of 1<sup>st</sup> Defendant submits that the action at Upper Area Court was determined in favour of the 1<sup>st</sup> Defendant and instead of the 2<sup>nd</sup> Defendant to go on appeal, they decided to use the Claimants to institute an action against their grandmother.

Counsel Cited ***ADESOJI V FUTA (2017) 9 NWLR (pt 1570) 208 at 221 C-D and MESSRS NV SCHEEP & ANOR V. THE MV'S ARAZ & ANOR (2000) 15 NWLR (pt.691) 622*** in deforming abuse of Court process and ***SARAKI V KOTOYE (1992) NWLR (pt. 264) page 156*** for circumstances that will give rise to abuse of Court process.

Counsel urged the Court to decline jurisdiction and sustain the objection. The Applicants in response filed a counter affidavit dated 9<sup>th</sup> December,2021 opposing the 1<sup>st</sup> Defendant notice of preliminary objection denying all the contents of the affidavit in support of preliminary objection excepts paragraphs 1,2,4,5,6 and 10 . That the Applicants were not aware of suit No CV/07/2020 before the Upper Area Court Gwagwalada between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Defendant and became aware of same after judgment had been delivered. That the Applicants Counsel advice them that their rights as children protected by the constitution of the Federal Republic of Nigeria 1999 can only be secured by the High Court.

That the Applicants have lived all their lives with the 2<sup>nd</sup> Defendant and their mother and are comfortable to continue living with the 2<sup>nd</sup> Defendant.

In their written address, Counsel on behalf of the Applicants addressed the same issue formulated by the 1<sup>st</sup> Respondent/objector wherein he contends that if the case of the Respondent is caught up by the doctrine of res judicata it would inadvertently mean that the Court has no jurisdiction to hear the present case.

Counsel submits that for the claim of estoppels per rem judicata to succeed the subject matter and claims must be the same. Counsel submits that the subject matter and claim before this Court and in suit CV/07/2020 are not the same. That the Applicants in this suit were at no time made parties before the upper Area Court of FCT.

That the subject matter in suit CV/07/2020 was for right of custody. See exhibit A attached while the subject matter in this suit is fundamental rights. That the reliefs sought in both suit are different.

Therefore that the 1<sup>st</sup> Respondent/objectors objection was on the ground that this suit is caught up by estoppels is misconceived.

That the matter before the Upper Area Court FCT was founded in Sharia Law .

That section 3 of the Child Right Act 2003 provides that Chapter iv of the constitution of the Federal Republic of Nigeria 1999 shall apply as if same where expressly stated in the Childs Right Act.

That the law donates in the locus standi to the children to and participate in the proceedings which necessitate the provisions in the act and the rules.

Whether the matter before the Court is estopple per rem judicatain/ res judicata. There are two kinds of estoppels that have been identified by the

Court; issue estoppels and cause of action estoppels see ***OSHODI V EYIFUNMI and ITO V EKPE (2000) 3 NWLR (pt 650) at 678.***

The one that concerns this case however is issue estoppels. This usually arise where an issue has been earlier on been adjudicated upon by a Court of competent jurisdiction and the same issue comes incidentally in question in any subsequent proceedings between the same parties (or their privies).

This is based on the principle of law that a party is not allowed to contend the contrary or opposite of any specific point which having been once distinctly put in issue, has with certainty and solemnity been determined against him see ***NIC & ANOR V FIRST CONTINENTAL INSURANCE CO. LTD***

In the case before the Court the 1<sup>st</sup> Defendant got judgment and custody of the Applicants in an upper Area Court in suit No CV/07/2020 see paragraph 5 (ki and ii) of Applicants affidavit in support of originating summons, exhibit 1 attached 2<sup>nd</sup> paragraph 9 and 11 of 1<sup>st</sup> Defendant's affidavit in support of notice of preliminary objection.

The Applicants have filed an originating summons before this Court praying for reliefs around custody of the Applicants instead of seeking redress of the lower Courts decision on appeal.

An appealable decision according to the Black's law dictionary 9<sup>th</sup> edition page 467 is a decree or order that is sufficiently find to receive appellate review see ***ALOR V NGENE 2 SC 2 (2007) 17 NWLR (pt 1062) 163 TIJANI & ANOR V OYEMIKA (2017) LPELR 43502 (CA).***

By section 8(1) and 93) of the legal personality low cap 79 laws of Anambra State.

An infant is defined as a human being under 21 years. Where an infant sues as Plaintiff he does so by a normal person described as his next friend

and where he is sue as a Defendant he defends through a normal person described as his guardian ad litem.

An infant cannot properly bring or defend an action by himself. If he is the one suing i.e the Plaintiff as in the present case, he should do so by another person designated his "next friend". If he is being sued i.e Defendant he should do so by another person designated his "guardian ad litem"

From the above postulation of the position of the law for an infant to be clothed with locus standi to institute an action in Court as a Plaintiff he must do so through his next friend " is only when that is done that he can be said to be a competent party to the action see **MAJOMI & ORS V MAJOMI JNR & ORS (2007) LPELR 3854 (CA). NWAGU V OKOLO (2012) LPELR – 9460 (CA).**

From the above Judicial authorities this case is improperly instituted and therefore the Court lack jurisdiction to proceed with the matter it should be noted that issue of jurisdiction is of fundamental principles of law which in all circumstances must be complied with strictly no matter how proceedings well conducted if the Court lacks jurisdiction such proceedings is a nullity in its entirety. From the objection raised it becomes imperative on the part of the Court to look into that jurisdiction of a Court to try a matter before it is very important because a judgment delivered by a Court without jurisdiction is a nullity. See **KWANI VS SLETTIMA (2001) FWLR (pt 71) AT 1870.**

An objection in respect of the issue of jurisdiction touches the competence and legality of the trial Court to try a case see **SHELL PETROLUM DEVELOPMENT COMP OF NIG LTD VS ISAIEL (2001) 11 NWLR (pt 723) at 168.** Jurisdiction is radical in nature and at the foundation of adjudication. So important it cannot be defeated by the provision of the rules of Court. See **AKEGBEJO VS ATAGA (1998) 1 NWLR (pt 543) at 462.** Jurisdiction is a threshold issue.

Thus, once the issue of jurisdiction is raised the Court must consider it first because where a Court takes upon itself to exercise a jurisdiction which does not possess its proceedings are futile and its decision amount to a nullity see **MADUKOLO VS NKEMDILIM (1962) 2 SCNCR 341** .

It was for this reason that the Court in the case of **A.G ANAMBRA VS AG. FED . SHELL**. Held that the request that the resolution of the question of the Courts jurisdiction be differed until the Plaintiffs have been heard on their claim cannot be acceded to because where a Court exercises a jurisdiction it does not possess, its decision amount to nothing” it is thus clear that there is no point a Court proceeding in a matter without the necessary jurisdiction. The constitution or the statutes that creates the Court defines the jurisdiction of a Court.

Therefore jurisdiction is a function of law in order to determine if a particular Court has jurisdiction to determine a case before it, the Court must examine the Plaintiff claim as contained in the writ and the statement of claim with a view to determining the cause of action and whether the cause of action falls within the jurisdiction conferred on the Court by the constitution or statue. See **MOBIL OIL NIG PLC VS KENE (2000) I NWLR (pt 695) p.555** . It can clearly be seen from the writ of summons filed and the statement of claim contained therein. It is clear that this Court lack jurisdiction to determine this matter reason can be seen from the judicial authorities cited above. Consequently this case is hereby struck out for want of jurisdiction.

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**HON. JUSTICE M.S IDRIS**  
**(PRESIDING JUDGE)**