IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA

THIS THURSDAY, THE 17th DAY OF MARCH, 2022.
BEFORE: HON. JUSTICE JUDE O. ONWUEGBUZIE – JUDGE

SUIT NO: FCT/HC/CV/1720/2021

BETWEEN:

RAHAB ZAMANI ----------APPLICANT

AND

ABUJA MUNICIPAL AREA COUNCIL----------RESPONDENT

JUDGEMENT

By an originating motion brought pursuant to the provisions of Section 44 of the Federal Republic of Nigeria Constitution 1999, Article 14 of the African Charter on Human and People's Rights, Order 11 Rules 1, 2, 3 and 5 of the Fundamental Rights (Enforcement Procedure) Rule 2009, the applicant sought for the following reliefs:

1. A declaration that the compulsory acquisition of the properties of the applicant without notice and without compensation by the respondent was illegal, null and void.
2. A declaration that the compulsory acquisition of those properties without notice and without compensation and subsequent reallocation of same to other person other than the Applicant which reallocation was not for public purpose was illegal, null and void.
3. An order compelling the respondent to pay the applicant the sum of Seventy-Three Million, Eight Hundred and Sixty-Six Thousand Naira

(N73,866,000.00) as special damages for the money spent on the properties erected on the plots allocated to her demolished by the Respondent for the six structures.

4. An Order compelling the Respondent to pay the sum of One Million and Eight Hundred Thousand naira (N300,000x6==N1.8m) being the purchase price of each plot at N300,000 each.
5. An Order directing the Respondent to pay the Applicant interest on the above sum of 25% or Twenty Million Naira (20m) as general damages.

The grounds upon which the orders and relief are sought are:-

a. That the demolition of the properties of the said Rahab Zamani and subsequent re-acquisition of the said plots without compensation is contrary to Section 44 (1) (a) & (b) of the 1999 Constitution was illegal, null and void.
b. That the re-acquisition of the said plots and reallocation of same to other persons without notice and public purpose was contrary to Article 14 of the African Charter on Human & People's Right is illegal, null and void.

In support of the application is a 12-paragraph affidavit deposed to by Rahab Zamani the Applicant himself, wherein he averred to the following facts:

That he was given allocations in Karu market to erect four huge shops and she also purchased two allocations from one Mr. Cupper, who gave him a power of Attorney to reflect the acknowledgment of receipt of amount paid to him. And she erected additional two more shops making a total of six shops.

That the shops were erected according to specified design by the respondent, and she was required to pay a monthly fee as rates and processing fees from the defendant.

That in 2016 the respondent demolished all the shops and other shops in the market notwithstanding that the allocation letter stated that the structures and allocation was permanent in nature and no notice was given as to the demolishing of the shops.

That the Respondent came with heavily armed men as at the time they came for demolition.

That the Respondent re-acquired the plots of lands after the demolition, but promised to give them new shops as they intended to erect same on the reacquired plots initially allocated to them.

That the administration which left office in 2016 did not fulfill its promises and they were not reallocated shops nor was any compensation given for the re-acquisition of the property.

That they in the construction and erection of the shops they had expended funds in the purchase of materials.

Documents comprising of allocation letters, receipts of payment, and Power of Attorney were frontloaded and marked as exhibits 1 to 13.

In compliance with the rules, a written address was filed and learned counsel to the applicant formulated two (2) issues for determination by the court to wit:

a. Whether the applicant's Right to property was breached by the Respondent in the compulsory acquisition of the properties of the Applicant without compensation.
b. Whether where the above issue No. A is in affirmative, the Applicant is entitled to compensation?

The arguments in respect of the issues formulated are as contained in the written address, needless repeating them as they form part of the record of the court.

In a way of opposition the defence filled a 16 paragraph affidavit deposed to by one Danladi Yerima a litigation Clerk in the Legal Department of the Respondent.

It was the case of the Defendant that the names of Rahab Zamani and Mr. Cupper are fictitious. That Exhibit 1 to 6 are fake. That there is no allocation in respect of plot 568, 570, 571,572 and 573 as the numbering are not in existence. That there is no record of an approved design or building plan for plot 568,569,570,571,572 and 573 as the said allocation does not exist.

The deponent further aver that the Respondent did not at any time require, request or even demand that the Applicant should pay any fees or rates in respect to the none existent allocation being paraded by her or any other allocation. That the Respondent was not a party to the purported personal transaction between the Applicant and one Mr. Cupper and Respondent cannot authenticate a transaction it is not a party to. That there is no record of any such shop building that is within the knowledge of the Respondent as alleged in paragraph 7 of the Applicant's affidavit in support of the Motion. That in further response to paragraph 7 of the Applicant's affidavit in support of the motion, there is no way the Applicant would have built a shop on none existence allocation.

The Respondent further aver that there is no single agreement or document that authenticates or gives any form of credence to the Claims of the Applicant in paragraph 9 and 11 of her affidavit in support of the motion. The Respondent further states that there is no nexus between the purported shops that the Applicant Claims she built and the items listed in paragraph 12 of her affidavit in support. The Respondent states that the Respondent does not allocate shops without a letter of allocation for shop space. That there is no copy of an application letter for shop spaces being claimed by the Applicant neither is there

any departmental receipt to justify the allocation paper being paraded by the Applicant as hers in this case. That on the whole the Respondent believes that the averments in paragraph 9 to 12 of the Applicants affidavit in support of her motion are a figment of her imagination as those paragraphs are unsubstantiated and should or cannot be relied upon by any Court of law, for the just determination of any case.

Also in compliance with the rules, a written address was filed and learned counsel to the applicant formulated two (2) issues for determination by the court to wit:

a. Whether this suit is competent to cloth this Honourable Court with the garment of jurisdiction, to entertain this same?
b. Whether in the circumstances of this case, this Honourable Court has the power to exercise its discretion in favour of the Applicant and grant her prayers as sought?

The arguments in respect of the issues formulated are as contained in the written address, needless repeating them as they form part of the record of the court.

The Applicant on the 2nd day of December, 2021 filed a 2 paragraph Further Affidavit in support of her Originating Motion deposed to by one Ogbenyeanu (Mrs) a litigation secretary from the office of the Applicant's Counsel. The Applicant stated that contrary to paragraph 4 of the Counter affidavit, the allocation letter has the seal of the Respondent on it, it also has the name, signature and the designation of the officer of the Respondent who allocated the plot to the Applicant on behalf of the Respondent. That the Respondent who claimed that Exhibit 1 is fake or forged has not denied the signature, the seal, the handwriting of the officer that signed the allocation letter in Exhibit 1.

Before I delve into the issues for determination raised by the respective parties, it is pertinent to address whether this matter was properly brought as an

application for the Enforcement of Fundamental Human Rights Pursuant to **Section 44 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended), Order II Rules 1, 2, 3 and 5 of the Fundamental Rights (Enforcement procedure) Rules 2009, and Article 14 of the African Charter on Human and peoples Right.**

It is trite that for a court to assume jurisdiction on an application brought pursuant to the Fundamental Right (Enforcement Procedure) Rules, the reliefs sought by the applicant must be thoroughly examined. See the cases of **Adekunle Vs. A.G Ogun State (2014) LPELR-22569 (CA) pages 42-**43paragraph E-G, ***Jimoh Vs. Jimoh (2018) LPELR-43793 (CA) PG 21-24 paragraphs C-F***

The provision **of section 44 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended)** provides that

"No moveable property of any interest in an immoveable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things…"

When an application is brought under the enforcement of Fundamental Rights Procedure Rules, a condition precedent to the exercise of the court's jurisdiction should be the main claim and not an ancillary claim. See the case of **Iheanacho Vs. NPF (2017) 12 NWLR (Pt 1580) CA 424**. Where the court held "that or a claim to qualify as falling under Fundament Right (Enforcement Procedure) Rules, it must be clear that the principal relief sought by the Applicant is for the Enforcement of Fundamental Human Right and not to redress a grievance that is ancillary to the principal relief which is not itself *ipso factor* a claim of Fundamental Right".

The Applicant in this instant case claimed that he was allocated four (4) plots of land for the erecting of shops in Karu market by the Respondent and she equally went further and purchased 2 more from an original allottee, that these shops were demolished by the Respondent without notice after they had erected same according to the Respondents' instructions and reallocation promised. Failure to keep that promise led to the instant application and the reliefs sought herein for the enforcement of the Applicant's right. The Enforcement of Fundamental Human Right is affidavit based. The Court must also examine the facts contained in the affidavit evidence and statement in support of the application whether such facts disclose reasonable course of action.

On the mode of commencement of action on alleged breach of Fundamental Right, Order 2 Rule 3 enjoins that an application shall be supported by a statement setting out the name and description of the applicant, the reliefs sought, the grounds upon which the reliefs are sought and supported by an affidavit setting out the facts upon which the application is made.

I have carefully considered the grounds and legal submissions of the learned Counsel on both sides. The cardinal issue that calls for determination is;

"**Whether or not the Applicant has made out a case to justify a grant of the application**."

It is found however, by this Court that affidavit based evidence would not in any way help the case of the Applicant. The law is settled that he who alleges the existence of facts must prove that those facts exist. The burden is on the Plaintiff to prove the facts which he alleges. See **Sections 131(1) & (2) and 132 of the Evidence Act.** See also the case **Lawrence Vs. Olugbemi&Ors. (2018) LPELR-45966 (CA)** where the Court of Appeal held:

> **Now, in civil cases, by the section 131 (1) & (2) of the Evidence Act, 2011, the burden of proof rest on the person who desires that the court give judgment in his favour. Such a person must adduce sufficient facts to proof that he is entitled to the judgment of the court. Accordingly, where such evidence is lacking or is insufficient and/or credible to sustain his claim, he would have failed to proof his case and the judgment of the court would be against him.**

Therefore originating motions or affidavit based procedure would not be appropriate but a writ, since the facts were disputed. It was decided that where the claims are declaratory, the proceedings should be begun by writ of summons. In a similar situation where there were disputed facts and the action commenced by originating summons or motions. See the case of **PDP & 2 ORS V. ALHAJI ATIKU ABUBAKAR (2007) (PT.1022) 515 at 541** where the court said :

> **I was of this same opinion, without shifting and held that: "I am of the humble opinion that the action should have been commenced by writ of summons so that the claim could be heard on pleadings and the issues resolved based on the pleaded facts.**
>
> See the case of **KEHINDE v. ACN & ORS (2012) LPELFR 14821 (Pp. 57 paras. B) (CA)**

The Respondent averred in paragraph 8 of its Counter Affidavit that there is nothing before this Court to substantiate the claims of the Applicant as deposed to in paragraph 9 and 11 of her affidavit in support of the Originating Motion. May be, It could have been different if the court had taken oral evidence had it been the Applicant came by way of Writ of Summons.

The Respondent averred in paragraph 7(b) of its Counter Affidavit that **"as far as he is concerned the names: RAHAB ZAMANI and MR. CUPPER are fictitious names and the Applicant should furnish further particulars to authenticate the identity of the RAHAB ZAMANI and MR CUPPER."**

Further at paragraph 7 (c) of the Respondent's Counter Affidavit it stated that **"from his personal experience and from the records available to him, Exhibit 1 to 6 are fake and there is no allocation in respect of plot 568, 569,570,571,572 and 573 as the said numbering are none existent."**

Also in paragraph7 (d) of the Respondent's Counter Affidavit it stated that **"Contrary to paragraph 4 of the Applicant's Affidavit in support of her Originating Summons, there is no record of an approved design or building plan for plot 568, 569,570,571,572 and 573 as the said allocation does not exist"**

They above depositions from the Respondent in this case are very much in conflict with the averments in the Applicant's Affidavit in support of the Originating Motion hence the case of the Applicant would be better calling of witnesses to proof her case. The Court found that Applicant needs to proof his case by calling witness and adducing evidence in this case. See the case of **OBIORA OKIGBO v. NDUBUISI OKIGBO & ORS (2014) LPELR-23413(CA)**

I quite agree with the learned Counsel to the Defendant submission that this suit technically boarders on declaration of title and other contentious issues which ordinarily ought not to be brought vide Originating Motions. Having regard to the Claims of the Claimant, this case ought to have been brought through Writ of Summons rather than Origination Motions , more so as both parties are not *ad idem* on the facts which renders the case highly contentious.

So I am of the firm view that facts deposed in paragraphs 3, 4 5, 6, 7, 8, 9, 10, 11, 12 of the Applicant's Affidavit and paragraph 2 of the Applicant's Further Affidavit in Support of the Originating Motion are substantial disputes of facts hence need to be proved by oral evidence. It is my humble opinion that this action ought not be commenced by way of Originating Summons and I so hold.

The law is trite that, Originating Summons or Motions are used for non-contentious actions, where therefore there is likely to be substantial disputes of facts or where the relief(s) sought by the Claimant is/are declaratory in nature, Originating Motions procedure that admits only affidavit evidence would not be advisable to be used. In such a situation, the action must be commenced by Writ of Summons, the facts being in very serious disputes. See the case of **AKINSETE V. AKINDUTIRE (1966) 1 All NLR p. 14; MABAMIJE V. OTTO (2016) lpelr-26058 (SC) and EZE V. UNIJOS (2017) LPELR-42345(SC).**

Albeit, the law is also settled that, it is not in all cases where there is conflicting affidavit evidence that Originating Motions cannot be employed, where there exist documentary evidence upon which the court may ground its decision, the action may be heard and determine on such evidence. See the case of **FALOBI V. FALOBI (1976) LPELR-1236(SC); NWOSU V. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (1990) 2 NWLR (Pt.135) p.688**

There is nothing before this Court to show or prove that the Respondent demolished or re-acquired plots of land at Karu Market allocated to the Applicant except only the depositions in paragraphs 8 to 11 of the Applicant's affidavit in support which the Respondent has denied and rebutted in paragraph 7 (g), (h), (i), (j),(k) and (l) of the Respondent's Counter-Affidavit.

The claim of the Applicant as contained in reliefs 3, 4 and 5 should be redressed by filling a writ of summons, I so hold.

However, as stated earlier, the Applicant's reliefs 1 and 2 can be brought by Originating Motion under the Fundamental Right procedure by virtue of **Section 44 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended),** but the challenge here is that, the Applicant has not succeeded in convincing this Court with the standard of evidence made available before this court. Therefore, the Applicant has not proved her case before this court to warrant the grant of relief 1 and 2.

In the final summation, this Honourable Court cannot grant prayers 1 and 2 based on the scanty evidence before it, hence reliefs 1 and 2 is hereby fails and accordingly dismissed.

No cost to award.

Hon. Justice Jude O. Onwuegbuzie

Appearances:

1. Oti Stephen Esq., for the Applicant.
2. Auta Nyada Esq., for the Respondent.