

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

ON MONDAY, THE 6TH DAY OF FEBRUARY, 2023.

BEFORE THEIR LORDSHIPS

CHIMA CENTUS NWEZE

JUSTICE, SUPREME COURT

MOHAMMED LAWAL GARBA

JUSTICE, SUPREME COURT

HELEN MORONKEJI OGUNWUMIJU

JUSTICE, SUPREME COURT

ADAMU JAURO

JUSTICE, SUPREME COURT

EMMANUEL AKOMAYE AGIM

JUSTICE, SUPREME COURT

SC/CV/1689/2022

BETWEEN:

ALL PROGRESSIVES CONGRESS

APPELLANT

AND

1. BASHIR SHERIFF

2. AHMED LAWAN

3. INDEPENDENT NATIONAL ELECTORAL

COMMISSION

RESPONDENTS

JUDGMENT

(Delivered by Chima Centus Nweze, JSC)

On June 22, 2022, the first respondent herein, Bashir Sheriff, commenced an action, by way of Originating Summons, at the Federal High Court, Damaturu Judicial Division, against the appellant, second and third respondents. He sought the determination of four questions contained at pages 1-155 of the Record of Appeal. They are as follows:

1. Whether in view of the provisions of Section 84 (5) (c) of the Electoral Act, 2022, and having regard to the provisions of Article 20.4 of the Constitution of the All Progressives Congress (APC) and the Guidelines for the Nomination of Candidates for the 2023 General Elections issued by the first defendant, it is lawful for the first defendant to recognize any person other than the plaintiff as its candidate, for Yobe North Senatorial District for the position of Senate.
2. Whether in view of the provisions of Section 84 (5) (c) of the Electoral Act, 2022, and having regard to the provisions of Article 20.4

of the Constitution of the All Progressives Congress (APC) and the Guidelines for the Nomination of Candidates for the 2023 General Elections issued by the first defendant, it is lawful for the first defendant to change the name of the plaintiff who emerged winner at the Primary Election conducted by the first defendant for Yobe North Senatorial District.

3. Whether in view of the provisions of Section 84 (5) of the Electoral Act, 2022, the first defendant is not under a mandatory duty to forward the name of the plaintiff as its candidate for Yobe North Senatorial District to the third defendant and the third defendant is under a duty to accord him recognition and publish his name as candidate for Yobe North Senatorial District.
4. Whether in view of the provisions of Section 84 (5) (c) of the Electoral Act, 2022, and having regard to the provisions of Article 20.4 of the Constitution of the All Progressives Congress (APC) and the Guidelines for the Nomination of Candidates for the 2023 General Elections issued by the first defendant, the purported primary election conducted on any date after the date of the Presidential Primary Election is not invalid, null and void the plaintiff who won the

primary of May 28, 2022, having not withdrawn his candidature.

In anticipation of favourable answers to these questions, the first respondent sought the following reliefs:

1. A DECLARATION that it is unlawful for the first defendant to recognize the name of the second defendant or any candidate other than the plaintiff as its candidate for Yobe North Senatorial District for 2023 Election.
2. A DECLARATION that it is unlawful for the first defendant to change the name of the plaintiff with the name of the second defendant in respect of the primary election conducted by the first defendant for Yobe North Senatorial District (Zone C) in which the plaintiff emerged winner and was so declared by the first defendant.
3. A DECLARATION that any name of candidate submitted by the first defendant to the third defendant not being the name of the plaintiff for Yobe North Senatorial District is unlawful, null and void.

4. AN ORDER of mandatory injunction directing the first defendant to accept and treat the plaintiff as its candidate for Yobe Senatorial District for 2023 Election.
5. AN ORDER of mandatory injunction directing the third defendant to accept and treat the plaintiff as the substantive candidate for the first defendant for Yobe Senatorial District for 2023 Election.
6. AN ORDER for mandatory injunction compelling the third defendant to accept and treat the plaintiff as the substantive candidate of the first defendant for Yobe North Senatorial District for 2023 Election.
7. AN ORDER of injunction restraining the second defendant from parading himself as the Candidate for the first defendant for Yobe North Senatorial District for 2023 Election.
8. AN ORDER setting aside the purported primary election conducted by the first defendant on any date after the presidential primary same not been conducted in accordance with the provisions of the Electoral Act, 2022, and the APC Guidelines for the nomination of candidate for the 2023 General Elections issued by the first defendant.

The parties duly joined issues on the Originating Summons. The affidavits and various objections of the appellant were heard together with the substantive matter in the Originating Summons. The Preliminary objections of the appellant bothered on jurisdiction of the trial court to entertain the first respondent's suit.

After taking arguments from the contending parties and considering evidence before it, the trial court, by its judgment delivered on September 28, 2022, found in favour of the first respondent. The trial court held inter alia, that the first respondent's action is a pre-election matter and being a pre-election matter, it falls squarely within its jurisdiction. Consequently, the trial court granted all reliefs sought by the first respondent under the Originating Summons. The judgment of the trial Court is contained at pages 768 - 817 of the Record of Appeal.

Aggrieved by the decision of the trial Court, the appellant appealed to the Court of Appeal, (hereinafter, simply, referred to as "the lower court"]. The lower court, in its judgment at pages 967-1098 of the Record of Appeal, affirmed the decision of the trial court.

Aggrieved by the decision of the lower court, the appellant has now appealed to this court via a Notice of Appeal filed on December 9, 2022.

The appellant filed his brief of argument on January 11, 2022. Therein he raised six issues for determination, to wit:

1. Whether in the circumstances of the appeal before the court below, especially with the allegation of fraud in the midst of other irreconcilable conflicts in the numerous affidavits, further affidavits filed by the parties in support of their various conflicting positions, the court below was correct to hold that the trial court was right to have

adjudicated the first respondent's case on the first respondent's originating summons.

2. Whether the court below has the jurisdiction to uphold the decision of the trial court which held that the first respondent is the lawful candidate for the appellant for Yobe North Senatorial District 2023 General Election by virtue of being the winner of the primary election said to have been held on 28/5/2022, when indeed the result of the said primary election, the third respondent's report and other exhibits relating to the said primary election in the first respondent's suit clearly showed that the said primary election which was conducted by the first respondent (Bashir Sheriff) himself along with three (3) other persons under the name and style of planning committee was conducted to nominate a candidate for a non-existent constituency called "Zone C" and the purported winner was one Alhaji Bashir Sherriff, a name different from the first respondent, (Bashir Sheriff)?
3. Whether their Lordships in the Court of Appeal were correct to have held that the appellant's appeal before their Lordships is an abuse of Court Process?
4. Whether the Court below has the jurisdiction to affirm the decision of the learned trial Judge that the first respondent was not given

a fair hearing in respect of the primary election conducted by the appellant on June 9, 2022, when the said first respondent never made any claim for relief for the nullification of the said primary election of June 9, 2022 in which the second respondent was returned as the winner of the said primary election?

5. Whether their Lordships in the Court of Appeal have lawful jurisdiction in view of the totality of the evidence adduced in the first respondent's suit including Exhibits 1, 4, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20A, 20B, 20C and 21 tendered by the first respondent to hold that the first respondent was entitled to the reliefs he claimed in his originating Summons?
6. Whether in the peculiar circumstances of the primary election of the appellant held on June 9, 2022, the third respondent's deliberate failure to monitor the primary election of the appellant held on June 9, 2022, could in law invalidate the result of the said primary election held on June 9, 2022?

The first respondent, on his part, filed his brief of argument on January 27, 2022. Therein he raised two issues for determination, as follows:

1. Whether the lower court was correct when it held that the trial court was right when it determined this case on the first respondent's Originating Summons?
2. Whether in the circumstances of this case, the lower court was right when it held that the only valid primary election for Yobe North Senatorial District conducted by the National Working Committee of the appellant was the one held on May 28, 2022, that produced the first respondent as the candidate for the Yobe North Senatorial District?

As required by law, each of the parties, through her counsel, adopted the relevant written arguments, at the hearing of this appeal on February 1, 2023.

In dealing with this appeal, I find, with all sense of responsibility as the law permits me, that a consideration of issue No. 1, raised by the appellant herein, would suffice for the determination of this appeal.

ARGUMENTS OF COUNSEL

It is the position of learned senior counsel that the ageless principle of our jurisprudence in respect of the utilization of the Originating Summons for the invocation of the jurisdiction of the Courts for the ventilation of grievances of an aggrieved has been firmly established to the effect that where the facts are in substantial dispute between the parties especially where there are allegations of crime as in this case where the appellant denied making Exhibits 8 and 9 attached to the affidavit in support of the Originating Summons, which were the documents relied upon by the first respondent as the fulcrum of his case.

He further submitted that the lower court failed to take into consideration the application of this legal principle to the facts of the case before it.

He further contended that the facts in the first respondent's Originating Summons are not merely hostile but irreconcilably hostile to the extent that even the documents tendered by the first respondents as exhibits in support of the reliefs he claimed raised more questions than answers and created self-doubts as to whether he is even the person that was returned as the winner of the alleged primary election said to have been conducted on May 28, 2022.

According to learned senior counsel, the lower court was wrong in upholding the decision of the trial court that the Originating Summons procedure employed to invoke the jurisdiction of the Court was proper for the following reasons. First, matters relating to fraud were raised by both the first respondent and the appellant which took away the determination of the first respondent's suit out of the

Originating Summons procedure. Second, Exhibit 8 and 9 said to be the alleged results of the primary election that the first respondent claimed to have won on May 28, 2022, were strenuously denied by the appellant as its deeds or documents, which made the suit to be one of hostility on a critical point. Third, Exhibit 8 stated that the alleged primary election held on May 28, 2022, was in respect of a non-existent and unknown Senatorial District called "Zone C" and there was no mention of the Senatorial District called Yobe North Senatorial District which candidacy the first respondent by his Originating Summons was claiming. He added that oral evidence need to be given as it is jurally impracticable to use the result of the primary election in respect of Zone C to claim candidacy for another Senatorial District called Yobe North Senatorial District.

Fourth, Exhibit 7 and 9 did not show any date on which the said result was made and an undated document is a worthless piece of paper that has no evidential value in law.

He further posited that Exhibit 7, 8 and 9 did not emanate from the appellant as there was no stamp or seal of the appellant on any of the documents. In support of this submission, he cited the case of *A. P. Cv. Elebeke* [2022] 10 NWLR (pt. 1837) 1, 45, paras C- D.

He further posited that Exhibit 20C which is the purported third respondent (INEC) report showed, eminently contradicted the first respondent's case to the effect that there was no legitimate primary election as the primary election was not conducted by the National Working Committee of the appellant, but by a planning committee and that same was

conducted for in respect of a pseudo constituency known as "ZONE C' Federal Constituency, which is a non-existent constituency. Same was found in Exhibits 12, 20A and 20B.

According to learned senior counsel, there were conflict in names. He pointed out that Exhibit 20C mentioned Alhaji Bashir Sheriff, a name different from the first respondent Bashir Sheriff. Also, Exhibit 10 is a letter from one Bashir Sherrif Machina which is a different name from the first respondent, whose name on the record before the Court is Bashir Sheriff. The name Machina is not included in the record of the Court and the surname before the Court is Sheriff not Sherrif. Similar contentions were made with regards to Exhibits 13 and 14.

He further submitted that the legal effect of these contradictions was that they did not support the

affidavit evidence of the first respondent that made claims to a primary election conducted for Yobe Senatorial District.

Finally, he canvassed that Exhibit 18 attached to the further affidavit in support of the Originating Summons is an unsigned document and of a doubtful origin irrespective of the name of the National Chairman and National Secretary of the appellant without their respective signatures and has no probative value, *A. P. G. A v. Al-Makura* [2016] 5 NWLR (pt. 1505) 316, 348.

More on the allegations of fraud, learned senior counsel submitted that a very close examination of all the paragraphs of the affidavit and further affidavit evidence of the first respondent undoubtedly showed that the first respondent made allegation of fraudulent practices against the appellant.

He further argued that the cumulative effect of these pieces of evidence is that the first respondent was directly accusing the appellant as being fraudulent in forwarding or seeking to forward the second respondent's name to the third respondent as the candidate for the Yobe North Senatorial District General Elections, 2023, when the second respondent allegedly never contested for any primary election for a senatorial seat to be entitled to be nominated as a candidate for the said Senatorial District General Election, with the underlying aim of depriving him of his entitlement.

He further posited that the appellant too accused the first respondent of relying on Exhibits 8 and 9 as the result of the primary election that he claimed he won, when such documents did not emanate from the appellant.

On the definition of fraud, learned senior counsel cited the *Ntuks v. N. P. A* [2007] 13 NWLR (pt. 1051) 392, 427 -428, paras H-B. reference was also made to Section 17 of the Penal Code Act.

He urged this court to resolve this issue in favour of the appellant and allow this appeal.

FIRST RESPONDENT'S SUBMISSIONS

While referring to paragraphs 6, 7, 8, 9, 10, 11 and 12 of the appellant's counter-affidavit, learned senior counsel submitted that the appellant set out its case in the above mentioned paragraphs to the effect that the appellant conducted a primary election to nominate its candidate to contest for the office of Senate for the National Assembly to represent the Yobe North Senatorial District on May 28, 2022, as against May 27, 2022 stipulated in Exhibit APC1. Furthermore, that the primary election, having been

conducted on May 28, 2022 as against the stipulated date scheduled by the national body of the appellant and contrary to the date given in Exhibit APC1, the appellant was compelled to review the exercise and resolved to reschedule and in fact conducted the primary election on June 9, 2022.

He further pointed out that the appellant did not controvert the disposition of Alhaji Danjuma Isa Munga, a member of the Yobe State Senatorial Primary Election Committee appointed by the National Working Committee of the appellant, who deposed to an affidavit wherein he stated that he was a member of the five-man Election Committee appointed to conduct the primary election for Yobe North Senatorial District at the end of which the first respondent emerged winner with 289 votes. This affidavit, having not been controverted, also put an end to the allegation of the primary election being

conducted by the Yobe State Chapter of the appellant.

He further submitted that the appellant did not deny that it conducted its primary elections for Yobe East and Yobe South Senatorial Districts in May 28, 2022. The appellant did not also deny that Yobe East Senatorial District result was a result of the election conducted by it.

He further submitted that the further affidavit in response to the counter affidavit of the appellant wherein Exhibits 20 A and 20 B were attached were not controverted by the appellant. He added that the appellant is deemed to have admitted facts deposed to in the said Further Affidavit, *Mabamije v. Otto* (2016) LPELR-26058 (SC).

He further posited that the second respondent was an aspirant to the Presidential Primary Election

of the appellant which concluded on June 8, 2022, and that the second respondent withdrew from the Yobe North Senatorial District Primary election of the appellant in order to contest in the Presidential Primary election of the appellant. This fact, was deposed by the first respondent in Paragraph 12 of the affidavit in support of the Originating Summons, adding that same has not been denied or controverted by the appellant, *Lawson-Jack v. SPDC (Nig.) Ltd* (2002) LPELR- 1767 (SC).

He further submitted that the appellant filed two Notices of Preliminary Objection at the trial Court. No grounds challenging the mode of commencement of the suit was contained therein, and as such, the appellant by law, is deemed to have waived any complained on the mode of commencement of the action.

He further submitted that the argument of the appellant that there exists several allegations of fraud in this matter is a figment of the imagination of the appellant. He added that by the argument of the appellant, all allegations of wrong doing will qualify as an allegation of fraud.

He further posited that issue had not been joined on whether Yobe North Senatorial Zone was the Senatorial District in respect of which Exhibit 8 was issued at the trial court, and the appellant cannot canvass a case different from its case at the trial court at this stage.

He further posited that the argument of that appellant that the first respondent added the name "Machina" to his name, Bashir Sherrif in Exhibits 10, 13 and 14 is of no help to the appellant because the

name of the first respondent is not in issue in this case.

He further posited that the proper avenue for denial of Exhibits is in the counter-affidavit of the appellant and not in the appellant's brief before this court as the said brief cannot take the place of evidence.

He further submitted that the argument of the appellant concerning Exhibit 20C is unsustainable in the face of Paragraph 19 of the Appellant's Guidelines for the Nomination of Candidates for the 2023 General Elections (Exhibit 3), which permits the Primary Election Committee to appoint party members to assist the Committee in its duty. Alhaji Danjuma Isa Munga at Paras. 6, 7 and 8 of his affidavit stated that the Primary Election Committee assigned him to conduct the primary election for Yobe

North District and he carried out this duty in the presence of the third respondent and security agents.

He further submitted that the exhibits now being attacked by the appellant were not controverted by the appellant at the trial Court, *Iyeke v. Petroleum Training Institute* [2019] 2 NWLR (pt. 1656) 217 at 239, paras G-H; *Ezechukwu v. Onwuka* [2016] 5 NWLR (pt. 1506) 529; *South Eastern States Newspaper Corporation and Ors v. Anwara* (1975) 9-11 SC 55.

He further submitted that the attempt by the appellant to expand the scope of its case to bring in facts upon which issues were not joined cannot be a yardstick to determine the correctness or otherwise of the lower courts in the hearing and determination of this case on the Originating Summons of the first respondent.

He urged this court to resolve this issue in favour of the respondent and dismiss this appeal.

REPLY BRIEF

Learned senior counsel filed a reply brief on January 31, 2023, wherein he submitted in response to the allegation that Alhaji Danjuma Isa Munga conducted the primary election as an appointed person of the National Working Committee and he signed Exhibit 8, that Exhibit 20C clearly stated it is a planning committee that Isa Munga was the Chairman that conducted the primary election on May 28, 2022 and issued the result, Exhibit 8.

He further argued that there is no evidence that Alhaji Danjuma Isa Munga was appointed by the National Working Committee as a Chairman of any primary election of the appellant for Yobe State.

Relying on *State v. Onaguruwa* (1992) 2 SCNJ 1, 20, learned counsel contended that the issue of jurisdiction need not be joined by parties at the trial court as it is neither too early nor late for a party to litigation to raise the issue of lack of jurisdiction in the Court.

He further submitted that in the entire length and breadth of the claims of the first respondent, there was nowhere the reliefs sought are connected to Yobe East and Yobe South Senatorial District. The lower court, in placing reliance on such issues it was not invited to resolve, occasioned a miscarriage of justice.

RESOLUTION OF SOLE ISSUE

At the outset, I wish to borrow a leaf from the Halsbury's Laws of England, Vol 10, whereby jurisdiction was defined in paragraph 314 as;

The authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decisions. The limits of this authority are imposed by statute...under which the court is constituted, and may be extended or restrained by similar means. *A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended, or it may partake of both these characteristics.*

From the above quoted excerpts, principally, in adjudication, therefore, jurisdiction is a creature of law and not the discretion, dislikes or likes of the parties. One of the indicia of jurisdiction is that the action or suit is initiated by due process of law.

The Federal High Court (Civil Procedure) Rules, 2019, particularly, Order 3 Rules 6, 7, and 8, thereof

provides for the nature and applicability of the Originating Summons, as one of the modes or way by which an action or suit can be commenced to vindicate a plaintiff/claimant's rights and obligations under an enactment, documents, deeds or instrument on question of construction thereof and for a declaration or relief as to the right claimed.

Long before now, the English Common Law, which Nigeria received, developed a genre of actions suitable for the Originating Summons procedure. This procedure came into the English legal system through the Chancery Procedure Act, 1852. It, however, only emerged as a feature of the rules of the English Courts in 1883, with the amendment of the 1875 Rules of the Supreme Court of England, *NBN v. Alakija* (1978) 2 LRN 78, 86 - 87.

In 1885, Cotton L.J. in *Re Powers, Lindsell v. Phillips* (1885) 30 Ch. D 291 stated that:

As regards the view taken by the Vice-Chancellor, it is true that it is not a right course to take out an *originating summons to obtain payment of a disputed debt, where the dispute turns on matters of fact.*

[Emphasis mine]

Lindley L.J. in the same case expressed very similar views. He said:

I think the Vice-Chancellor can hardly have understood that in this case there are no facts in dispute. *A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact, but where there is no dispute of fact, the validity of the debt can be decided just as well on summons as in action.*

[Emphasis mine]

In another landmark pronouncement of Cotton, L.J. in *Re Giles and Personal Advance Co. v. Michell* (1890) 43 Ch. D 391, the Law Lord explained the

purpose of the procedure of Originating summons as follows:

...to enable simple matters to be settled by the court without the expenses of bringing an action in the usual way, *not to enable the court to determine matters which involve a serious question.*

[Emphasis mine]

The judgment of Lindley L.J in *Re Holloway (A Solicitor), ex parte Pallister* (1894) 2 QB 163, 167- 68 furnishes valuable insights into its historical evolution. Lindley L.J. explained that the "Originating Summons" was conceived as a method of commencing certain chancery proceedings in chambers, as opposed to the conventional method of lodging an equitable bill.

The same principle has also been emphasized by this court in a long list of decided cases of this Court,

Re Doherty, *Doherty v. Doherty* (1967) 1 ANLR (reprint) 260, 265, where Ademola, CJN, frowned at the invocation of the Originating Summons procedure in "hostile proceedings," *National Bank of Nigeria v. Alakija* (supra); *Inakoju v. Adeleke* (2007) 1 CCLR 240, 31; *Eze v. UNIJOS* (2017) LPELR - 42345 (SC).

Likewise, in the case of *Sani v. Kogi State House of Assembly* [2019] 4 NWLR (pt. 1661) 172, 183-184, paras H-D, this Court highlighted the domain of the Originating Summons procedure, thus:

What type of action/case is the Originating Summons procedure best suited for? I will commence by throwing more light on an Originating Summons Process. In the case of *Hussaini Isa Zakirai v. Salisu Dan Azumi Muhammad and ors* (2017) LPELR - 42349 (SC), (2017) 17 NWLR (pt. 1594) 181, this court had this to say:

In effect, Originating Summons is a procedure wherein the evidence is mainly by way documents and there is no serious dispute as to their existence in the pleadings. It is usually heard on affidavit evidence and involve questions of law rather than issues of fact.

By the above proposition, Originating Summons *is best suited for cases where there are no substantial disputes of facts* or likelihood of facts.

In the case of *Standard Cleaning Services Company v. The Council of Obafemi Awolowo University, Ile-Ife* (2011) 14 NWLR (pt. 1269) 193 at 204 - 205, 213, the court held that:

Originating Summons should only be applicable in circumstances where there is no dispute on the question of facts or *even the likelihood of such dispute*. Application for initiating contentious issues of facts where the facts of the plaintiff leave matter for conjecture, Originating Summons is not appropriate procedure. *Where it is obvious from the state of the affidavit that there would be an air of friction in the proceedings, then an Originating Summons is not appropriate*. Originating summons should be used only where the proceeding involves question of law, rather than disputed facts, even where the facts are not in dispute, the Originating Summons should not be used, *if the proceedings are hostile*.

[Emphasis mine]

The above case was also cited with approval in the more recent decision of this Court, in *Mr. Uba v.*

Chief (Dr.) George Moghalu and Ors [2022] 15 NWLR (pt. 1853) 271, 307-308, paras. D - C thus:

Where documents avail and abound, it is more convenient, expeditious, cheaper and better to rely on them by the court than to resort to pleadings. The instant case is one out of many that this court has given judicial approval and commendation for the use of Originating Summons to prosecute cases founded on primary elections since documents speak and assist more than words.

Originating Summons is a procedure wherein the evidence is mainly by way of documents and there is no serious dispute as to their existence in the pleadings. It is usually heard on affidavit evidence and involves questions of law rather than issues of fact.

See: *Hussaini Isa Zakirai v. Salisu Dan Azumi Muhammad and Ors.* (2017) LPELR- 42349(SC), (2017) 17 NWLR (pt. 1594) 181, *Sani v. Kogi State House of Assembly and Ors.* (2019) LPELR-46404 (SC) 13 -16 paras. D; [2019] 11 NWLR (pt. 1661) 172; *Dapianlong and Ors. v. Dariye and Anor* (2007) LPELR-928 (SC) 46 paras. A; [2007] 8 NWLR (pt. 1036) 239.

Now, it is almost inconceivable that parties would go to court to litigate over issues in which there are no disputes at all between them, perhaps just of the

fun of it. Thus, every suit must involve a dispute or a disagreement; for if it were not so, then what would be the basis of the litigation? What is prohibited however, in Originating Summons procedure, is substantial dispute of facts.

As demonstrated above, Originating Summons is, particularly, employed in commencing a suit when what is in dispute is the mere construction of documents or interpretation of law in respect of which pleadings are unnecessary or where there is no real dispute as to facts between the parties, G. F. Harwood, *Odger's Principles of Pleadings and Practice in Civil Actions* (Twentieth Ed) (New Delhi – India: Universal Law Publishing Co. Pvt. Ltd, 2010) 352; F. Nwadialo, *Civil Procedure in Nigeria* (Lagos: University of Lagos Press, 2000) 211; *Arjay Ltd and Ors v A. M. S. Ltd* (2003) LPELR -555 (SC).

Others include *Inakoju and Ors v Adeleke and Ors* (2007) LPELR -1510 (SC); *Pam and Anor v Mohammed and Anor* (2008) LPELR -2895 (SC); *National Bank of Nigeria Ltd and Anor v. Alakija and Anor* (1978) LPELR -1949 (SC); *Ezeigwe v. Nwawulu and Ors* (2010) LPELR – 1201 (SC); *Famfa Oil Ltd v. AG, Fed and Anor* (2003) LPELR -1239 (SC).

The situation is different in a suit commenced by Writ of Summons where the facts are regarded as holding a pride of place and the fountain head of the law in the sense that the facts lead to a legal decision on the matter. That is not the position in proceedings commenced by Originating Summons, where facts do not play a central role but an infinitesimal role. On the distinction between Originating Summons and Writ of Summons, see the following cases: *Dapianlong v. Dariye (supra)*; *Keyamo v. House of Assembly, Lagos State* [2002] 18 NWLR (pt. 799) 605; *Director, SSS v.*

Agbakoba [1999] 3 NWLR (pt. 595) 314; *Famfa Oil Ltd v. Attorney-General, Federation and Anor* [2003] 18 NWLR (pt. 852) 453; *Inakoju v. Adeleke (supra)*; and *Attorney-General, Adamawa State and Ors v. Attorney-General, Federation and Ors* (2005) LPELR-602 (SC).

Facts may be inconsequential in proceedings commenced by way of Originating Summons, which are determined on affidavit evidence, but it is important that conflicts in the affidavits are not glossed over. It is thus improper to commence civil proceeding by Originating Summons where the facts are likely to be in substantial dispute and thus proceedings for which it is used usually involves questions of law rather than disputed issue of facts.

A survey of the earliest English cases, and the leading Nigerian Supreme Court decisions, would

reveal the judicial attitude to the invocation of the Originating Summons procedure. In both jurisdictions, courts disclaim the propriety of resolving matters “of a contentious nature” by Originating Summons, *Re Sir Lindsay Parkinson and Co Ltd Settlement Trusts* [1965] 1 All ER 609; *Re Powers, Lindsell v. Phillips* (1885) 30 Ch D 291; *Re Giles, Real and Personal Advance Co v Michell* (1890) 43 Ch D 391; *Re Doherty, Doherty v Doherty* [1967] 1 A. N. L. R. [reprint] 260, 265, [where Ademola CJN frowned at the invocation of the Originating Summons procedure in “hostile proceedings”]; *NBN v Alakija* (1978) 2 LRN 78, 86-87; *Famfa Oil Ltd v A-G Federation* (supra).

In *Inakoju v Adeleke* (2007) 1 CCLR 240, 311, Tobi JSC summed up the attitude of the apex court to this question thus:

Commencement of action by Originating Summons is a procedure which is used where the facts are not in dispute or there is no likelihood of their being in dispute... Originating summons is...not [for] matters of such controversy that the justice of the case could demand the settling of pleadings.

What then are the facts in this case? The facts are not to be found in submissions of counsel but in the affidavit evidence before the Court.

I am aware that it is not every seeming conflict arising from affidavit evidence that would warrant the calling of or resort to oral evidence for its resolution. However, where the issues of facts are contentious and border of the copious allegations of fraudulent practices as in the first respondent's suit, it calls for caution on the path of the court from rushing to determine such a claim on affidavit evidence alone in an Originating Summons, as such a case is, in my view, one more suited and proper for determination

on the pleadings and evidence of the parties under the procedure by way of a Writ of Summons.

In the instant case, the bedrock of suit before the trial court, from a perusal of the affidavit and further affidavit of the first respondent, along with exhibits attached thereto, shows that there were allegations of fraudulent practices by both parties.

It is here necessary to reproduce some material portion of the affidavit in support of the Originating Summons filed at the trial Court.

15. I state that there was only one primary election of the first defendant held for Yobe North Senatorial District and I know that the second defendant who was not an aspirant at the first defendant's primary election for Yobe North Senatorial District Did not score the highest number of votes at the primary election of the first defendant held for Yobe North Senatorial District.
16. I state that by a letter dated 13th June, 2022, I wrote clarifying to the first defendant that I remained committed to my mandate which I won at the primary election of the first defendant and never signed any document to vacate my said

mandate. Copy of the letter duly collected by the Deputy National Organizing Secretary of the first defendant is hereby attached as Exhibit 13.

17. I similarly wrote to the Chairman of third defendant on 15th June, 2022, clarifying that I remained the candidate of the first defendant and never signed to relinquish my mandate. Copy of the letter duly received by the third defendant is attached as Exhibit 14.
18. I made inquiries in the office of the third defendant regarding the names of candidates submitted by the first defendant on June 17, 2022, for the 2023 General Elections and discovered that the name of the second defendant was sent by the first defendant to the third defendant in contravention of the Electoral Act, 2022, the Constitution of the All Progressives Congress and the Guidelines for the Nomination of Candidates for the 2023 General Elections issued by the first defendant.
19. I state that, having won the primary election of the first defendant, as candidate for Yobe North Senatorial District, the first defendant is under a duty to submit my name as its candidate for Yobe North Senatorial District to the third defendant.
20. That on 21st day of June, 2022, the National Chairman of the first defendant in person of Dr. Abdulahi Adamu while answering questions from State House correspondents said that Ahmed Lawan participated in the party primary election for Yobe North Senatorial District.
21. ...
22. ...
23. ...

24.
25. ...
26. ...
27. ...
28. ...
29. I state that I did not withdraw my candidature for Yobe North Senatorial District for the 2023 General Elections.

I have carefully read the affidavit, further affidavits endorsed in the Originating Summons and counter affidavits and I am of the view that the first respondent made allegations of fraudulent practices against the appellant as well as other irreconcilable conflicts.

Order 3 Rule 2 (b) of the Federal High Court (Civil Procedure) Rules, 2019, provides that where a suit is based on or alleges an allegation of fraud, it must not be commenced by Originating Summons.

Surely, any attempt "to prove the liability of the defendant" through the Originating Summons procedure, where the Affidavit (s) and Counter

Affidavits evince the subsistence of substantial disputes, must be resisted, *Inakoju v Adeleke* (supra); *Re Sir Lindsay Parkinson & Co Ltd Settlement Trusts* (supra); *Re Powers, Lindsell v Phillips* (supra); *Re Giles, Real and Personal Advance Co v Michell* (supra); *Re Doherty, Doherty v Doherty* (supra).

It cannot be otherwise for substantial disputes could only be resolved in the usual adversarial proceedings upon the settlement and exchange of pleadings: averments in pleadings borne out by oral evidence -oral evidence tested in cross examination, *Cameroon Airlines v Otutuizu* (2011) LPELR -827 (SC) 36; *Insurance Brokers v. Atlantic Textile* [1996] 9 10 SCNJ 171, 183; *Housing Corporation v. Enekwe* [1996] 1 SCNJ 98, 133; *Odutola v. Papersack Nig Ltd* [2006] 18 NWLR (pt. 1012) 470; *Aake and Anor v. Akun* [2003] 14 NWLR (pt. 840) 311; (2003) LPELR -72 (SC) 9, paragraph G; *Ajuwon v. Akanni and Ors* [1993] 9

NWLR (pt. 316) 182, 200; *Magnusson v. Koiki and Ors* [1993] 9 NWLR (pt. 317) 28.

More fundamentally, there is considerable force in the submission that the trial court, wrongly, purported to determine the suit – a suit in which the claimant/first respondent hauled criminal allegations against the appellant as defendant – through the Originating Summons procedure, *Nwobodo v. Onoh* [1983] LPELR -8049 (SC) 6-7, F-A; *Emmanuel v Umana and Ors* (2016) LPELR -40037 (SC) 17 – 18.

Indubitably, that approach was a sacrilegious affront to a basic requirement that a person, who is so confronted, should be able to confront his accuser. This is, usually, done through cross-examination or by the confrontation or contradiction of all the witnesses that testify against him; *Nwanegbo v. Oluwole* (2001)

37 WRN 101; *Dawodu v. N. P. C.* (2000) 6 WRN 116; *Durwode v. The State* (2001) 7 WRN 50.

The first respondent submitted that the argument of the appellant that there exists several allegations of fraud in this matter is a figment of the imagination of the appellant. In other words, that fraud was not central to its case. I find this submission a little bit misconceived.

This is because in law, an allegation of fraud requires that the particulars of fraud be set out to confer any modicum of seriousness on such an allegation of fraud to warrant further enquiry into it at trial.

In other words, unless and until an allegation of fraud is, expressly, made and supported by its particulars, it is a non-starter as it is well settled that a mere or bare or banal allegation of fraud, no matter

how grave, is of no moment if it is not supported by the relevant particulars as required by law, *Nammagi v. Akote* [2021] 3 NWLR (pt. 1762) 170.

An allegation of fraud that is merely generic, vague and lacking in the specific and particulars is in law a non-starter and useless, *PDP v. INEC and Ors* (2012) LPELR 9724 (SC) *Nishizawa Ltd v. Jethwani* (1984) 12 SC 234; *UBA and Anor v. Alhaji Babangida Jargaba* [2007] 11 NWLR (pt. 1045) 247.

What then is fraud or what in law can amount to fraud? In law, fraud has simply been defined as an advantage gained by unfair means; a false representation of fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false. Fraud also means an intentional perversion of truth for the purpose of inducing

another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

It is also a false representation of a matter of fact whether by words or by concealment of that which should have been disclosed, which deceives another so he shall act upon it to his legal injury, Jowitt's Dictionary of English Law, Vol. 1, 2nd Edition, p. 827; Black's Law Dictionary, 8th Edition, p. 660.

My Lords, the law, both in England and in Nigeria, has always been that where fraud is alleged in civil or criminal proceedings, it is analogous to imputation of a crime which has to be proved beyond reasonable doubt, Section 135 (1) (2) and (3) of the Evidence Act, 2011, *Flower v. Lloyd* (1878) 10 Ch. D. 327; *Jonesco. v. Beard* (1930) All E.R Rep. 483; this court of Nigeria has also held the same views in a plethora of authorities: *Olufunmise v Falana* [1990] 4 SCNJ

142, 157; *Folami v Cole* [1990] 4 SCNJ 18; *Nwobodo v. Onoh* (supra); *Talabi v Adeseye* [1972] 8 - 9 SC 20, 40. This is, equally, the position in East Africa, *Kulsumbhai Gulamhussein Jaffer Ramji and Anor v Abdul Jaffer Mohmmmed Rahim and Ors* [1957] E.A 699.

In the instant case, particulars were not even set out on the allegations of fraud as required by law, between the parties on the strength of the affidavit evidence placed before the lower court by the first respondent. The Originating Summons procedure was, irredeemably, improper to commence a suit founded steeply on allegation of diverse acts of fraud, misrepresentation and forgery.

Such allegations are criminal in nature and central to the claims of the first respondent. They must be proved beyond reasonable doubt even in a civil

proceedings and thus suitable for proceedings commenced by way of Writ of Summons, Section 135 (1) of the Evidence Act 2011; *UAC Ltd. v. Taylor* (1936) 2 WACA 70; *Usenfowokan v. Idowu* (1969) NMLR 77; *Nwobodo v. Onoh and Ors.* (1984) NSCC 1.

With the allegations of fraud, coupled with other irreconcilable conflicts in the numerous affidavits, counter-affidavits and further affidavits filed by the parties, it becomes crystal clear that there is palpable dispute on the facts which make the proceedings hostile and unsuitable for adjudication under the Originating Summons procedure. As this court held in *Ekanem and Ors v. The Regtd Trustees of the Church of Christ, the Good Shepherd and Ors* (SC/349/2011 delivered on 02/12/2022):

With the allegation in fraud in the affidavit evidence before the trial court, there was the need to call oral evidence in order to prove same in accordance with the standard required and prescribed by law: beyond reasonable doubt. That standard cannot be met on affidavit evidence alone,

which cannot be tested under cross examination for its credibility...

It is thus clear to me that the judgment of the trial court and the lower court on the first respondent's Originating Summons, which they reached on disputed depositions in affidavits, were perverse and occasioned miscarriage of miscarriage of justice and so liable to be set aside. This must be so for where the procedure adopted to ventilate grievances is wrong, the processes ought to be struck out, *Odiase and Anor. v. Agho and Ors.* [1972] 1 All NLR (pt. 1) 170, 177.

Facts are the spring board of law. It is the facts of the case that determine the appropriate procedure. The first respondent's case is lost because of the unpardonable procedure resorted to by learned senior counsel for the first respondent. An action by

way of Originating Summons may sound romantic and possibly prosaic, but it could lead to a loss of a case because of a parade of abysmal ignorance as to what to do.

Accordingly, this appeal is allowed and the judgment of the Court of Appeal, Gombe Judicial Division, sitting in Abuja, delivered on November 28, 2022, which affirmed the judgment of the Federal High Court, Damaturu Judicial Division, delivered on September 28, 2022 and all the orders made therein, are hereby set aside. The first respondent's suit is, hereby, struck out.

Chima Centus Nweze
Justice, Supreme Court

COUNSEL:

TheNigerianLawyer