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IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON WEDNESDAY THE 22ND DAY OF OCTOBER, 2014
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI---JUDGE

SUIT NO. FHC/ABJ/CS/197/2014

BETWEEN

MR TERIAH JOSEPH EBAH ----- PLAINTIFF

AND

FEDERAL GOVERNMENT OF NIGERIA----- DEFENDANT

JUDGMENT

This judgment is in respect of the Plaintiff's Originating Summons dated 17th day of March, 2014 and the Defendant's Notice of Preliminary Objection dated 28th day of April, 2014.

The Originating Summons poses four questions for determination as follows:

1. Whether the provisions of same sex marriage (prohibition) Act, 2013 particularly sections 1(1)^A and B(2), 2(1) and (2) and 3 do not violate and contravene Nigeria citizens' Fundamental Rights Enshrine and protected in section 42(1)(A) and (B) and (2) of the Constitution of the Federal Republic of Nigeria 1999 as amended and Articles 2, 3(1) and (2),

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19 and 28 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 419 Laws of the Federation of Nigeria 2004.

2. Whether the provisions of the same sex marriage (Prohibition) Act 2013 particularly sections 4(1)(2) and 5(1),(2) and (3) are not impediment constituting disabilities to Nigeria citizens' Fundamental Rights enshrine and protected in sections 40 and 35 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Articles 6 and 10(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004.

3. Whether the provisions of the same sex marriage (Prohibition) Act, 2013 particularly sections 1(1)A and B(2), 2(1) and (2) and 5(1) are not inconsistent with Nigeria citizens' Fundamental Rights enshrine and protected in sections 37 and 34 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 28 of the African Charter on Human and Peoples' Rights (Ratification and

Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004.

4. If the issues above are resolved in favour of the Applicant, whether the purported same sex marriage (Prohibition) Act, 2013 is not inconsistent with the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Africa Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 2004 are accordingly unconstitutional, null and void.

Pursuant to these questions the plaintiff claims six reliefs as contained on the face of the Originating Summons.

In support of the Originating Summons is an affidavit of twenty – two (22) paragraphs.

Also in support of the Originating Summons is a written address which the plaintiff adopted as his written address.

The defendant filed a counter affidavit of five paragraphs in opposition to the Originating Summons. In support of the counter affidavit is a written address which learned counsel for the defendant adopted as his oral argument.

In response to the defendant's written address the plaintiff filed a reply on points of law.

In further opposition to the Originating Summons the defendant filed a notice of preliminary objection dated 28th day of April, 2014. It is supported with a written address. The defendant also filed additional point of preliminary objection dated 12th day of May, 2014. In support of the said additional point of preliminary objection is a written address.

In opposition to the Respondent's Notice of preliminary objection the Applicant filed a reply address dated 30th day of April, 2014. He also filed a reply to the Respondents' additional point of preliminary objection.

The Respondent filed a reply on points of law to the Applicants written address in Opposition to the preliminary objection.

I have read the written submissions of learned counsel in this mater. I will first of all deal with the Notice of preliminary objection. I will adopt the sole issue formulated for determination by the defendant's counsel and adopted by the Applicant's counsel. The sole issue is 'whether the Applicant's suit before this Court is competent having regard to the provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended'.

In his address in support of the preliminary objection Abidogun Esq for the defendant submitted that the Applicant has no locus standi to institute this action. That the term 'locus standi' entails the legal capacity of a plaintiff to institute, initiate or commerce an action in a competent Court of law Tribunal and he relied on the case of Elendu V Ekwoaba (1995) 3 NWLR (part 386) page 580 and Reynolds Industries Ltd V Lapidio (2002) 22 WRN (page 140).

That the two tests for determining whether or not a person has locus standi to institute an action are:

- i. The action must be justiciable, and**
- ii. There must be a dispute between the contending parties and he relied on UBA Plc V BTC Industries Ltd (2004) 18 NWLR (part 904) page 180. That in Bewaji V Obasanjo (2008) 9 NWLR (part 1093) page 540; it was held that "under public law, an ordinary individual or citizen or a tax payer without more will generally not have locus standi as a plaintiff. This is because such litigations concerns public rights and duties which belong to and are owed**

all members of the public including the plaintiff himself....”

Learned counsel also referred to section 46(1) of the 1999 Constitution as amended. He also relied on section 1(1) of the Constitution regarding the supremacy of the Constitution.

In his response on behalf of the Applicant, Mr Enakoro relied on the preamble to the Fundamental Rights (Enforcement procedure) rules 2001 and submitted that the Court are enjoined to encourage and welcome public interest litigation in the human rights field and no human right case may be dismissed or struck out for want of locus standi.

He submitted that the Applicant is challenging the Constitutionality of the same sex marriage (prohibiting) Act, 2013 and therefore urging the Court to declare the Act unconstitutional. He submitted that a law made pursuant to the provisions of the Constitution equally has the force of law as the Constitution and he cited Court of Appeal decision in the case of Abia State University, Utura V Chima Anyaibe (1996) 1 NWLR (part 439) page 646.

As I earlier said above; I have carefully considered the submissions of learned counsel.

This is a Fundamental Right action and for the Applicant to have right to approach the Court he has to show that any of the provisions of the Charter of the Constitution dealing with Fundamental Rights "has been, is being or likely to be Contravened in any state in relation to him" before he can approach the Court.

I am not unaware of the provision of the preamble to the Fundamental Right (Enforcement Procedure) rules 2009 which gives right of action to a person to institute an action on behalf of a third party.

The preamble reads:

The Court shall encourage and welcome public interest litigation in the Human Rights field and no human rights case may be dismissed or struck out for want of locus standy....

There is no doubt that the Fundamental Right (Enforcement Procedure) rules derives its validity from the constitution and that being so its provision should not be inconsistent with the provision of the Constitution. Although it had been held to have the same force of law as the Constitution in *Abia State University V Anyaibe supra* but only to the extent that it is not in conflict with the Constitution or an Act of the National Assembly. The Supreme Court while dealing with the

rules of the Court of Appeal in the case of Kalu V Odili (1992) 5 NWLR part 240 page 130 at 195 D - E said:

I have already discussed in this Judgment the provisions of section 272 of the Constitution which vests in the president of the Court of Appeal the power to make rules for regulating the practice and procedure of the Court of Appeal. The rules made by virtue of powers so conferred are laws made by powers derived directly under the Constitution. Although they are made subject to the provisions of any Act of the National Assembly they have the same force of law as the Constitution itself. Thus the Court of Appeal rules are valid and enforceable in so far as they are not inconsistent with the provisions of the Constitution or an Act of the National Assembly”

By section 46(1) of the Constitution:

“any person who alleges that any of the provisions of the this chapter has been, is being or likely to be contravened in any state in

relation to him may apply to a High Court in that State for redress”

By this provision he has to establish that he has suffered from the action of the defendant or is likely to suffer. The said section does not give an individual to sue on behalf of other persons.

Just like the Court of Appeal rules in Kalu’s case the Chief Justice of Nigeria derives his power to make the Fundamental Right (Enforcement Procedure) rules from the Constitution, so must be in conformity with the provision of the Constitution. It is therefore my considered opinion that the preamble to the rules which the Applicant relied upon to institute this action is inconsistent with section 46(1) of the 1999 Constitution as amended.

Having so ruled, I hold that the Applicant has no locus standi to bring this action on behalf of the “Gay Community in Nigeria” In any case there is nobody or organisation in Nigeria called lesbian, gay, bisexual and transgender (ILGBT) community. Even the Applicant himself did not describe him as a gay.

Having held that the Applicant has no locus standi to institute this action the properly order to make is that of striking out.

The Applicant case is accordingly struck out.

A. Abdu - Kafarati
A. Abdu - Kafarati
Judge
22/10/2014

Parties absent.
Mr Mike Enahoro Ebah for the Applicant.
Mr T. A. Gazali for the defendant (with him Mrs H. Ajanah and Mrs C. N. Achara)