

**IN THE CHIEF MAGISTRATE COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA MAGISTERIAL DISTRICT**

HOLDEN AT ABUJA

SUIT NO: _____

MOTION NO: _____

**IN THE MATTER OF A CRIMINAL COMPLAINT BROUGHT PURSUANT TO
SECTIONS 88, 109 (a), 110 (1) (c) OF THE ADMINISTRATION OF CRIMINAL
JUSTICE ACT, 2015**

BETWEEN:

KENECHUKWU OKEKE ----- COMPLAINANT/RESPONDENT

AND

- 1. AISHA YESUFU ----- DEFENDANTS/APPLICANTS'**
- 2. OSEYI ETOMI**
- 3. SAM ADEYEMI**
- 4. YEMI EBERECHI ALADE**
- 5. FAKHRRIYYAH HASHIM**
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- 48.IRE ADERINOKUN**
- 49.DIPO AWOJIDE**
- 50.ADEBOLA WILLIAMS**

MOTION ON NOTICE

**BROUGHT PURSUANT TO SECTIONS 88, 109, 110 & 381 OF THE
ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015, SECTION 211 OF THE**

**CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED
2011) AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE
COURT**

TAKE NOTICE that this Honourable Court will be moved on the day of 2020 at the hour of 9 O' clock in the forenoon or so soon thereafter as Counsel for the Defendants/Applicants' will be heard praying this Court for:

1. AN ORDER STRIKING OUT THE SUIT of the complainant for incompetence and non-compliance with the provisions of the extant laws, i.e., the Administration of Criminal Justice Act 2015 and the Constitution of the Federal Republic of Nigeria 1999 (as amended 2011).

2. AND FOR SUCH FURTHER OR OTHER ORDERS as this honourable court may deem fit to make in the circumstances of this case

DATED THIS 16TH DAY OF NOVEMBER 2020

Abdul Mahmud Esq.

Eshiet Charles Esq.

Victor Ikenna Chinyeaka Esq.

Defendant/Applicants' Counsel

Ephesis Lex

42 Tunis Street, Off Bissau Street, Wuse Zone 6, Abuja

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FOR SERVICE ON:

THE COMPLAINANT/RESPONDENT

Kenechukwu Okeke

Plot 224, Gana Street

Maitama

Abuja

PREMIUM TIMES

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AFFIDAVIT IN SUPPORT OF MOTION ON NOTICE AND IN REPLY TO THE COMPLAINANT'S AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

I, Victor Ikenna Chinyeaka, Adult, Male, Christian, Lawyer, Nigerian Citizen of 42 Tunis Street, Wuse Zone 6, Abuja, do hereby make oath and state as follows:

1. That I am a legal practitioner in the Law Firm of Ephesis Lex (Barristers & Solicitors), Counsel to the Defendants/Applicants by virtue of which I am familiar with the facts of this case.
2. That I have the consent and authority of the Defendants/Applicants and that of the Principal Counsel, Abdul Mahmud ESQ to depose to this affidavit.
3. That by virtue of my position aforesaid, I am familiar and conversant with the facts of this case and as herein deposed.
4. That I depose to this affidavit from facts within my personal knowledge.
5. That I was informed by the 17th Applicant/Defendant, Deji Adeyanyu, on the 10th day of November 2020 at our office at 42 Tunis Street, Wuse Zone 6, Abuja, and I verily believe him as follows:

(a) That the deposition in Paragraph 2 of the Complainant's affidavit in support of the criminal complaint is false, untrue and misleading in part.

(b) That in response to the aforementioned paragraph 2, I was informed only the 1st, 17th, 18th, 45th and 47th Applicants/ Defendants are domiciled in the Federal Capital Territory, Abuja.

(c) That in response to Paragraph 2 of the said affidavit and save for the 5th, 29th, 32nd, 36th and 49th Applicants/Defendants who are domiciled in London, South Africa, London, New York and United Kingdom respectively and the Applicants/Defendants mentioned in (b) above as residing in Abuja, all the other Applicants/Defendants are domiciled in Lagos, outside the jurisdiction of this court.

6. That there are no facts in all the paragraphs of the complainant's affidavit that show that the complainant complied with due process in laying his complaint before this honourable court.

7. That this suit is both an abuse of court processes and an easily perceivable attempt at wasting the time of this Honourable Court which ought to be spent on more productive and real concerns.

8. That I depose to this affidavit in good faith, conscientiously believing its content to be true and correct and in accordance with the Oaths Act currently in force in the high court.

DEPONENT

Sworn to at the Registry of the Chief Magistrate Court, Abuja

This 16th day of November, 2020

BEFORE ME

COMMISSIONER OF OATHS

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DEFENDANTS/APPLICANTS' WRITTEN ADDRESS IN SUPPORT OF THE MOTION
ON NOTICE

1.0. INTRODUCTION

1.1 By a complaint dated and filed on the 9th day of November 2020, the complainant brought this complaint pursuant to sections 88, 109 (a) and 110 (1) (c) of the Administration of Criminal Justice Act, 2015 as well as under the inherent jurisdiction of this honourable court, seeking for the reliefs as contained in the complaint.

1.2. In reaction to the Complainant's affidavit in support of the Application to file a criminal complaint, we have filed a motion on notice and a seven paragraphs counter affidavit deposed to by Victor Ikenna Chinyeaka, a lawyer of 42 Tunis Street, Wuse Zone 6, Abuja in support of the defendants' motion on notice and in reply to the complainant's affidavit.

We most humbly crave the indulgence of Your Worship to state the preliminary points of law arising from the complaint's affidavit

PRELIMINARY POINTS OF LAW

1.3. We humbly submit that paragraphs 3, 4 and 5 of the complaint's affidavit violate Section 115 of the Evidence Act 2011 on the content of an affidavit. Section 115 (2) of the Evidence Act 2011 is hereunder reproduced for ease of reference:

"An affidavit shall not contain extraneous matter by way of objection, prayers or legal argument".

1.4. In furtherance to the above submission, the said paragraphs of the affidavit are hereby reproduced as follows:

PARAGRAPH 3

" That the 1st-50th accused persons, between the 3rd day of October 2020 and 28th October 2020, using Twitter, an Internet web resource with URL (<https://www.twitter.com>) within the jurisdiction of this honourable court did conspire amongst themselves to commit misdemeanor, to wit; promoting and acting in such a manner, with intent to assist in the promotion of an unlawful assembly under the guise or composition of "#EndSARS" and thereby committed an offence punishable under Section 97(2) of the Penal Code Act, C53, Laws of the Federation of Nigeria, 2004".

PARAGRAPH 4

"That the 1st to 50th accused persons with intent to carry out some common purpose, assemble in such a manner, or, being assembled under the composition of "#EndSARS", as to cause persons in the Federal Capital Territory Abuja to fear on reasonable grounds that such assembly needlessly and without any reasonable occasion may provoke other persons tumultuously to disturb the peace.

a. Properties belonging to the complainant was egregiously destroyed by some riotous and tumultuous person instigated and incited by the 1st to 50th accused persons".

PARAGRAPH 5

"The averments as espoused in this complaint is (sic) not intended to be a complete recitation of all the applicable facts in issue or relevant facts relating to the conspiracies to assist in the promotion of an unlawful assembly (#EndSARS) riots, and shall not be deemed to constitute a waiver or relinquishment of any of the complainant's constitutional right to fair hearing, all of

which are hereby reserved, including complainant's right to tender all available computer-generated evidence by virtue of Section 84 of the Evidence Act".

1.5. A cursory look at the paragraphs of the complainant's affidavit reproduced above will reveal that they are arguments and conclusions and contain laws, as opposed to facts only. In consequence, we humbly submit that they are liable to be struck out and discountenanced by this Honourable court.

In urging Your Worship to so hold, we refer the Honourable court to *Bamiyi v State* (2001) 8 NWLR (PT 270) 289 and 290 where the court held that:

"by virtue of Sections 86 and 87 (and now Section 115(2)) of the Evidence Act 2011, an affidavit used in court must contain only statement of facts and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true and shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion... Prayers, objections and legal arguments are matters that may be pressed by counsel in court and are not fit for a witness either in an oral testimony or in affidavit evidence; while conclusions should not be drawn by witness but left for the court to reach".

2.0 ISSUES FOR DETERMINATION

Your Worship, in opposing this application, we respectfully submit that the issues that call for determination are as follows:

1. Whether the complainant was rightfully empowered by law to make this complaint.
2. Whether the court is properly seized of jurisdiction to entertain this suit.

3.0. LEGAL ARGUMENT ON ISSUES

ISSUE 1

3.1. It is most humbly submitted that the alleged offences of criminal conspiracy and unlawful assembly which the complainant raised in Paragraph 3 of the affidavit in support of the criminal complaint, to wit;

" That the 1st-50th accused persons, between the 3rd day of October 2020 and 28th October 2020, using Twitter, an Internet web resource with URL (<https://www.twitter.com>) within the jurisdiction of this honourable court did conspire amongst themselves to commit misdemeanor, to wit; promoting and acting in such a manner, with intent to assist in the promotion of an unlawful assembly under the guise or composition of "#EndSARS" and thereby committed an offence punishable under Section 97(2) of the Penal Code Act, C53, Laws of the Federation of Nigeria, 2004"

are federal offences created by Sections 97, 100, 101, 102, 104, 105, 106, 107, 108, 109 and 110 of the Penal Code Act, Cap 53, Laws of the Federation of Nigeria, 2004 for which the states of Northern Nigeria can adjudicate.

3.2. A cursory look at the short title of the aforesaid Penal Code Act, which provides that "This Act may be cited as the Penal Code (Northern States) Federal Provisions Act", will reveal that all offences created by the Penal Code Act are meant to take effect as state offences in the case of the Northern States and deemed as federal offences in the Federal Capital Territory. It is most humbly submitted that criminal conspiracy (created by Section 97 of the Penal Code Act) and unlawful assembly (created by Sections 100-110 of the aforesaid Act) are federal offences, as they apply to the Federal Capital Territory, which only the Attorney General of the Federation, lawyers in his chambers, or the Police under Section 4 of the Police Act 2020, can prosecute.

We respectfully submit that the complainant, being not an authority or person contemplated by Section 174 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 4 of the Police Act, 2020, lacks the competence to lay a criminal complaint and or prosecute the defendants over alleged federal offences. We rely on the Supreme Court decisions of *Anyebe v The State* (1986) 1 SC 87 and *Emelogu v The State* (1988) 2 NWLR (PT 78) 524.

3.3. It is further submitted that the "Right of making complaint " granted to a private person by Section 88 of the Administration of Criminal Justice Act 2015 (hereinafter called ACJA 2015) does not exist in vacuo, nor is it at-large. In fact, it is our humble submission that by the community reading of Sections 88, 89, 381 (d) and 383 (1) the "Right of making complaint" by a private person is neither total nor absolute. The exercise of the right of private prosecution stated in Section 88 is subject to the fulfillment of the conditions set out in Section 89, and more particularly the condition stated in Section 89(5), to wit: "All complaints made to the court directly under this section may first be referred to the police for investigation before any action is taken by the court"; and Sections 381(d) and 383(1).

3.4 For ease of reference and consideration, Section 88 provides as follows:

- (1) "A person may make a complaint against any other person alleged to have committed or to be committing an offence.
- (2) Notwithstanding anything to the contrary contained in any other law, a police officer may make a complaint in a case of assault even though the party aggrieved declines or refuses to make a complaint".

Section 89 provides as follows:

(1) "It is not necessary that a complaint shall be in writing, unless it is required to be so by the law on which it is founded, or by some other law, and where a complaint is not made in writing, the court or registrar shall reduce it into writing.

(2) Subject to the provisions of section 54 of this Act, a complaint may, unless some law otherwise requires, be made without oath.

(3) A complaint may be made by the complainant in person, or by a legal practitioner representing him, or by any person authorized in writing in that behalf.

(4) A complaint shall be for one offence only, but the complaint shall not be avoided by describing the offence, or any material act relating to it in the alternative words according to the language of the law constituting such offence.

(5) All complaints made to the court directly under this section may first be referred to the police for investigation before any action is taken by the court".

Section 381(d) provides as follows:

"An information may be filed by:

(d) a private person, provided (emphasis is ours) the information is endorsed by a law officer that he has seen such information and declined to prosecute at the public instance and the private person enters into a bond to prosecute diligently and to a logical conclusion".

Section 383(1) provides as follows:

"The Registrar shall receive an information from a private legal practitioner where:

(a) the information is endorsed by the Attorney General of the Federation or a law officer acting on his behalf stating that he has seen the information and has declined to prosecute the offence set out in the information; and

(b) the private legal practitioner shall enter into a recognizance in:

(i) such surety as may be fixed by the court, with a surety, to prosecute the information to conclusion from the time the defendant shall be required to appear;

(ii) pay such costs as may be ordered by the court, or

(iii) deposit in the registry of the court, such sum of money as the court may fix".

3.5. We submit that following the literal rule of interpretation, the language of Sections 88(1), 89, 381(d) and 383(1) is clear and unambiguous. We further submit that a private person can only make a complaint and or institute criminal proceedings subject to the fulfillment of the condition set out in Sections 89(5), 381(d) and 383(1) outlined above. It is further submitted that Sections 88, 89, 381 and 383 are like Siamese Twins that cannot be separated. Thus, the complainant cannot exercise the right of making complaint conferred by Section 88(1) without first complying with the conditions set out in Sections 89(5), 381(d) and 383(1) ACJA 2015.

There is nothing in the complainant's affidavit or averments indicating that the complainant complied with Sections 89(5), 381(d) and 383(1), so we humbly urge Your Worship to hold that from the facts adduced in the complainant and the defendants' affidavits, the complainant lacks the power and competence to lay a criminal complaint and or institute criminal proceedings against the defendants. For our submission on the interpretation that this Honourable Court should place on Sections 88, 89, 381(d) and 383(1), we most respectfully refer Your Worship to *Coca Cola Nig. Ltd v Akinsanya* (2017) 17 NWLR (PT 1593 74 at 123, wherein Eko JSC held thus:

" The better approach is to adopt the construction that brings out the purpose of the legislation on the understanding that parliament legislates for a purpose"

Finally on this issue, Your Worship, it is our humble submission that the criminal complaint before this Honourable Court was not properly initiated by due process of law, nor were the

conditions precedent to the exercise of the jurisdiction of this Honourable Court fulfilled by the complainant. We urge Your Worship to hold that the defect in the competence of the complainant is fatal and any proceedings arising thereof is a nullity. See *Madukolu & Ors v Nkemdilim* (1962) 2 SCNLR 341.

3.6. What is more? The powers of detection and investigation of crimes are vested in the Nigeria Police Force by virtue of Section 4 of the Police Act 2020. These powers cannot be by-passed, circumscribed, or circumvented by the complainant, no matter his ill-will or good intention. We humbly submit that the powers to carry out criminal investigation that could lead to charges or criminal information filed before our courts are exclusive to the Nigeria Police Force. See *Ajayi v The State* (2013)9 NWLR (PT 1360) 589. In this regard, therefore, there is nothing in the Seven paragraphs of the affidavit deposed to by the complainant that suggest that a formal complaint was made to the police requesting it to carry out investigation into the allegation made in Paragraph 4(a) of the complainant's affidavit. We humbly submit that the complainant cannot exercise powers he does not have. The applicable Maxim remains, "ex nihilo nihil fit", which means, "nothing comes from nothing".

See *Macfoy v U. A.C Ltd* (1961) 3 All E.R Pg 1169 at Pg.1172 Per Lord Alfred Denning (Master of Rolls). *Sken Consult (Nig) Ltd v Secondary Ukey & Anor* (1981) 1 SC.

In recognition of these facts, we submit that the requisite steps have not been followed by the complainant who is a legal practitioner and is reasonably expected to know the position of the law on such matters. It is visible to all that there is a fundamental and fatal flaw in the procedure that has been followed in instituting this action.

3.7. The second issue for determination is on whether, given the above arguments made to expose the fatal procedural misadventure of the complainant in deviating so radically from what has been laid down as law and espoused by the courts as precedent on what the appropriate procedure to follow as regards filing a criminal complaint or indeed, any other criminal proceeding is, this court has jurisdiction to entertain this matter.

3.8. In the well celebrated case of *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341, the apex court held that jurisdiction is very fundamental in any suit, whether civil or criminal and can be raised at any time in the course of proceedings, even for the first time at the Supreme Court. More importantly, it held that a court is incompetent and without jurisdiction where any or all the conditions precedent for assuming jurisdiction are absent. In their own words;

“Where a court is constituted and none of the members are disqualified by qualification and the quorum is present and the subject matter is within jurisdiction and all the conditions precedent for assumptions of jurisdiction such as the appropriate notices have not been breached then a court is competent”

The Courts have held in plethora of cases that any decision arising from a court that lacks jurisdiction no matter how well considered or written will be a nullity and a waste of precious judicial time (*Madukolu v. Nkemdilim* Supra; *Edet v. State* (2009) All FWLR (Pt. 463) 1430; *Onwudiwe v. FRN* (2006) All FWLR (Pt. 319)).

3.9. In light of the above, we submit that there is one ground for contesting the jurisdiction of the court to entertain this matter and it is that the court cannot hear a person who has not followed the laid down procedures for instituting an action in law or exercise jurisdiction over such action. The decision of the court in *Madukolo v Nkemdilim* (supra) makes that much clear. Under our

first issue for determination, we have exhaustively dealt with the question of procedure for laying a complaint and have shown that the complainant fell glaringly short of the said procedures and as such, does not have the locus to lay his complaint.

3.10. However, assuming but not conceding that he had satisfied the conditions laid down for laying his complaint as a private person or one rightly empowered to act on behalf of the state, there is the very disturbing question of his false claim that all the defendants are domiciled in Abuja. In our affidavit, we have stated that of the fifty Defendants/Applicants', only, he perjured himself and by so doing, offending Section 156 of the Penal Code Act which is reproduced underneath for ease of reference:

“Whoever, being legally bound by an oath or by an express provision of law to state the truth or being bound by law to make a declaration upon a subject, makes a statement, verbally or otherwise, which is false in a material particular and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.”

In the case of *Ibrahim & Anor v. Dogara & Ors* (2015) LPELR-40892(CA), the Court of Appeal held elegantly that:

“the implication or legal effect therefore of an oath is to subject the person who took an oath to penalties for perjury in the event that the testimony turns out to be false.”

See *Chukwuma v. Nwoye & Ors* (2009) LPELR-4997(CA).

On the strength of the above, we invite this honourable court to find the complainant guilty of giving false evidence, the sort, rendering the court incapable of entertaining his complaint as its grounds are tainted with procedural irregularity and evidentiary illegality.

We urge the court to so hold in striking out the criminal complaint filed by the complainant.

Dated this _____ day of _____ 2020

Abdul Mahmud Esq.

Eshiet Charles Esq.

Victor Ikenna Chinyeaka Esq.

Defendant/Applicants' Counsel

Ephesis Lex

42 Tunis Street, Off Bissau Street, Wuse Zone 6, Abuja

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