DIGITAL RIGHTS IN NIGERIA:
THROUGH THE CASES

EDITED BY
Solomon Okedara
Olumide Babalola
Irene Chukwukelu

Digital Rights Lawyers Initiative

Luminate

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PREFACE

THE CONCEPT OF DIGITAL RIGHT owes it origins to the unprecedented technological incursion into almost every conceivable human endeavours including human rights. Contrary to the impression given in some quarters that digital rights are a new sets of rights, they are rather, the replication of legal rights on the Internet and on digital platforms.

In simple terms, digital rights are (human) rights exercised through the access and utility of the Internet and digital platforms. Hence, such rights which are manifested digitally enable individuals to use computers and other digital platforms to exercise all conceivable legal rights that are ordinarily enjoyed offline.

Nigeria caught the bug of digital rights upon her increased migration of socio- economic activities on the Internet. Nevertheless, the Nigerian judiciary is gradually embracing the reality of digital rights as shown in some of the cases reviewed herein.

The Digital Rights Lawyers Initiative was predominantly founded to champion the cause of digital rights in Nigeria, hence, this publication showcases all the digital rights cases litigated by DRLI including a few ones handled by other organizations.

It is important to put it forward here that, this publication is not an academic review of digital rights cases nor a scholarly work on the concept of digital rights, rather, it is a publication of some court decisions on digital rights as it pertains to Nigerians. This publication is however best suited for a reference material especially on the Nigerian courts' decisions on digital rights over the years.

We take full responsibility for all the errors in this publication with a promise to improve on them in subsequent editions as the Nigerian jurisprudence on digital rights continues to grow.

Thank you

Respectfully

Olumide Babalola
Co - Founder, DRLI
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United Kingdom

ABOUT DRLI

Digital Rights Lawyers Initiative (DRLI) is a not-for-profit, Non-Governmental Organization committed to protection and promotion of digital rights through Litigation, Advocacy, Research and Training (LART). DRLI was once a dream conceived by its co-founders, Olumide Babalola and Solomon Okedara in Paris in 2018 at the Internet Governance Forum (IGF) and became a legal entity by registration with the Corporate Affairs Commission in Nigeria on the 7th day of January, 2019. In three years, DRLI has earned a frontline spot as a digital rights defender through its timely and critical efforts in protection and promotion of digital rights.

Over the last two (2) years, we have worked on Data Protection & Privacy, Digital Identity, Online Expressions, Right to Own Digital Assets, Access to the Internet, Right to Information among others. We have worked in the aforementioned areas by way of litigation, webinars, litigation surgeries, internships and trainings.

While we have made legal representation in over 50 cases in courts across Nigeria including Magistrate's courts, High Courts, Federal High Court, Court of Appeal and the Community Court of Justice of ECOWAS in individual and strategic cases on subject matters involving

Data Protection & Privacy, Digital Identity, Online Expressions, Right to Own Digital Assets among others, we have provided below synopsis of some of our cases.

Solomon Okedara,
Co- Founder, DRLI

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ABBREVIATIONS

CA	Court of Appeal
CCJ	Community Court of Justice
CFRN	Constitution of the Federal Republic of Nigeria
DPO	Data Protection Officer
DRLI	Digital Rights Lawyers Initiative
ECOWAS	Economic Community of West African States
FHC	Federal High Court
FREP Rules	Fundamental Rights Enforcement Procedure Rules
HC	High Court
ITLRAI	Incorporated Trustees of Laws and Rights Awareness Initiative

LPELR	Law Pavilion Electronic Law Reports
LUMINATE	Luminate Group
NDPR	Nigeria Data Protection Regulation 2019
NDPR IF	Nigeria Data Protection Regulation Implementation Framework
NIMC	National Identity Management Commission
NITDA	National Information Technology Development Agency
NWLR	Nigerian Weekly Law Report
SC	Supreme Court
SME	Small and Medium Enterprise

NOTES ON CONTRIBUTORS

Solomon Okedara is a Barrister and Solicitor of the Supreme Court of Nigeria, is a practicing legal Practitioner and Researcher with over fourteen (14) years post–call experience and expertise in litigation and non–litigious areas of practice. Solomon has a special bias for Human Rights (specially focusing on Freedom of Expression), Data Protection & Privacy, Digital Identity, Access to Internet and Online Expressions. He is armed with a peerless ability in creative legal research and analysis, delivering impressive results in review of laws, legal principles and standards. Solomon is a partner at Solomon Okedara & CO (a firm of Barristers and Solicitors) and co–founded Digital Rights Lawyers Initiative–a not for profit NGO that focuses on promotion and protection of digital rights through **L**itigation, **A**dvocacy, **R**esearch and **T**raining (LART).

Solomon is a strategic litigation lawyer with a robust interest and proven expertise in Freedom of Expression and Digital Rights litigation. He has litigated on Digital Rights and Freedom of Expression subjects in courts across Nigeria and at the ECOWAS Court among others. Solomon currently serves as a Legal Researcher with Columbia University in the city of New York for the ivy–league school's Global Freedom of Expression project where he analyses judgments bothering on Freedom

of Expression subjects covering over 120 jurisdictions across the world including United States, Europe, India, and Africa among others. Solomon was in 2020 recognized as one of the Top 50 Individuals Leading in Legal Innovations in Africa at the Africa Legal Innovation Awards 2020. He is a 2016 Research Fellowship Recipient of *International Center for Not for profit Law (ICNL)*, Washington DC. He was recognized in 2017 "Heroes of Human Rights" by *Access Now*. Solomon was specially recognized as a Finalist at the 2018 Global Freedom of Expression Prize of Columbia University.

Olumide Babalola who holds a Masters degree in International commercial Law with ICT at the University of Reading, United Kingdom, is a consummate privacy and data protection lawyer in Nigeria.

His expansive work around data protection saw him publish Nigeria's first textbook on data protection in 2020–an editorial compilation of 144 decisions of the European courts on the subject. Olumide has spoken on issues surrounding data protection at local and international conferences including: RightsCon in Tunis (2019) the United Nations Internet Governance Forum (IGF) in Berlin (2019), Afritech Conference in Nairobi (March 2020), PivSec Global (2020), Workshop on Fintech by the European Commission (2021), Privacy Symposium b Unwanted witness in Uganda (2021) PrivSec New Normal in London (2021).

In September 2021, he led the team that worked on a pan–African report on data protection authorities in Africa and in November 2021, on the invitation of African Economic Research Consortium, Kenya, he presented a research paper on 'data protection legal regime and data governance in Africa' at the Regional Policy Forum on data governance and sound policy making in Africa.

In December 2021, Olumide published his most recent book titled 'Privacy and data protection law in Nigeria.' The book also prides

itself as Nigeria's first academic book on right to privacy. Olumide is the managing partner of Olumide Babalola LP and a member of the International Association of Privacy Professionals, International Network of Privacy Law Practitioners.

Emmanuel T. Okpara is a seasoned legal practitioner with wide practice experience. He is poised to the advancement of secured human right environment and has chosen the part of development of digital rights preservation. After his law school program in Abuja, he is currently tasked with a dissertation topic on fundamental rights and data protection in his master's program. He is resident in Owerri, Imo state and has distinction records in the legal field.

Nonso Anyasi is an Associate Partner at Godspower Ojehumen & Associates. He obtained his LLB from the University of Benin, and he has worked as a Senior Counsel and a Data Protection Solicitor at various law firms. He is the PRO of the NBA–SLP Young Litigators Committee and the Interim Coordinator of the Justice Reform Project (JRP). He is also a member of the Digital Rights Lawyers Initiative, and serves in different capacities in other professional NGOs. Nonso has handled briefs on diverse areas of law and also published legal and academic articles on different areas of law including Data Protection, Cybersecurity, Labour Law, Constitutional Law and Legal Ethics for Lawyers.

Izuchukwu David Umeji is a Data Privacy Attorney, with interests in technology and innovation. He holds an undergraduate degree in law, and presently a post–graduate research fellow for a Master of laws degree, both from Nnamdi Azikiwe University, Awka. David has also garnered competencies in project planning and management, HSE, and is a graduate of several leadership modules from JCI Skills Development, USA. He has donated time and resources to non–profit volunteering, serving in several capacities in Junior Chamber International–a global

youth organization focused on developing leaders for a changing world.

Professionally, David performs as Lead Partner at Hamilton Chappell LC, a specialist law consultancy focused on commercial, entertainment & creatives, intellectual property & technology, data protection and online privacy practice.

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Taofeek Jaji Olaseni is an Associate Counsel in the law firm of Tejumola Adeyemi & Co and with over 9years of post–call experience in human rights, corporate and commercial law, real estate and litigation. He has represented more than 40 clients at all stages of trial beginning from receipt of instructions during clients' interview to the conclusion of trial.

Felix Emmanuel is an Associate in the Dispute Resolution Practice of Olaniwun Ajayi LP. He is an alumnus of the University of Nigeria. He is currently developing expertise in the area of Data Protection and Privacy Law.

Irene Chukwukelu is a Legal Officer at Digital Rights Lawyers Initiative, Editor at International Lawyers Assisting Workers Network with over 4 years' practical experience in privacy, data protection, human rights, digital identity, labour law, freedom of expression and digital rights. She has drafted and filed over 40 human and digital rights cases both at the Nigerian and ECOWAS courts on issues of law involving privacy, data protection, digital identity, ownership of digital assets, online freedom of expression etc. At Digital Rights Lawyers Initiative, Irene oversees a network of over 100 digital rights lawyers in Nigeria. In April 2022, she

was part of the Consultative Forum on Access to Justice held in Accra, Ghana for lawyers across Africa by GIZ.

Ugochukwu Eze is a legal practitioner with about four (4) years' experience and expertise in Dispute Resolution with special bias for Data Protection, Digital Rights, Freedom of Expression and Media Law, Administrative and Development Law, Human Rights and Financial Technology. He presently works with the Technology and Media, Litigation and Dispute Resolution as well as Shipping and Oil Services Practice Groups of a leading commercial law firm in Lagos State. Testament to his interest and experience in digital rights advocacy, he has advised and represented various clients including multinational corporations and government parastatals on issues and matters relating to freedom of expression, data privacy and regulatory compliance. He has also instituted public interest actions against government agencies for breach of fundamental rights and disregard for the rule of law.

He is an active member of relevant local and international professional bodies including the Data Protection Litigators Network (DPLN), the Innovation and Technology Lawyers Network, the Intellectual Property Lawyers Association of Nigeria and the London Court of International Arbitration–Young International Arbitration Group (LCIA–YIAG). Ugochukwu is an industrious lawyer with great confidence and a keen eye for details. He has authored scholarly publications on legal issues relating to arbitration, taxation, labour, administrative law and administration of justice.

Jonathan Arome Agbo is a Legal Practitioner with cognate experience in Commercial Dispute Resolution, Intellectual Property, Election Petition, Labor Law and Human Rights Advocacy. He is an Alumnus of Ahmadu Bello University Zaria and is currently a Partner at Crown Solicitors. He has conducted high profile cases on behalf of Nigeria's Electoral Body (INEC), represented the University of Ibadan in labour

matters and advised on academic and disciplinary policies. He is involved in high profile debt recovery on behalf of the Asset Management Corporation of Nigeria in addition to advising Tech Startups in Nigeria. Jonathan's advocacy focuses on legislative reforms that encourages the introduction of drug demand reduction programs and treatment for persons with substance use problems rather than incarceration. He provides legal assistance to indigent persons arrested in connection with substance use. He has received local and international training on substance use issues including the Drug Treatment Prevention and care (facilitated by the UNODC), the Universal Prevention Course (Colombo Plan Drug Advisory Program) and Continuing Legal Education for substance use Defense attorneys. He has also received the UNODC facilitated training on the implementation of the sentencing Guidelines for convicted drug offenders in Nigeria. A certified prevention professional, Jonathan is a member of the International Society of Substance Use Professionals (ISSUP), Legal Advocacy and Response to Drug Initiative, Data Protection Litigation Network, West Africa Drug Policy Network, Intellectual Property Lawyers Association of Nigeria and the Nigerian Bar Association. He loves watching football and spending quality time with loved ones.

1

INTRODUCTION

The explosion of digital technology has substantially changed the way basic rights such as the freedom of expression, access to information, ownership of digital assets, right to privacy etc. are exercised, protected and violated. While the protection of basic human rights is universally recognized and forms part of the corpus juris in many countries, the recognition and exercise of those rights in the digital space, though an extension of the universal freedom, is a relatively new concept in many others, including Nigeria. Technological advancement is constant and with it comes the need for regulatory frameworks to protect digital rights and the establishment of digital ethics that prevent the violation of such rights. Many countries in the world have made laws or regulations to preserve digital rights by providing remedies and sanctions for the violation of such rights. In many cases, such laws recognize specific aspects of digital rights such as the right to privacy and data protection. An example is the Data Protection Act, 2018 which governs data privacy online in the United Kingdom. The law makes extensive provision for the right to maintain an up–to–date data, data portability, right of informed consent for use of personal data, data erasure and objection to illegal use of data among other rights[1]

1 www.gov.uk/data–protection.

Over the ages, attempts to protect digital rights have led to the development of case laws such that the rights guaranteed by law have crystallized through the cases and allow for ease of reference in similar cases in the event of subsequent breach. There is thus a rich body of decided cases with respect to the protection of statutorily guaranteed rights both locally and internationally. The cases not only elucidate existing legislation with respect to data protection and other aspect of digital rights but also reinforces the compliance obligation of individuals, companies and governments around the world. [2] When compared to other jurisdictions, Nigeria lacks a comprehensive statutory provision with regards to digital rights. The lack of a comprehensive law on digital rights in Nigeria, however, has not prevented spirited attempts by digital rights advocates to protect the rights of citizens to enjoy constitutionally guaranteed rights to privacy, freedom of expression online, expansion of the digital market and related rights. These efforts have culminated in the development of case law. For example, the right to enjoy privacy online, data mining and control and the obligation of relevant agencies of the government to protect users' data have all been recognized as constitutional obligations.

This paper reviews the various judgments of the different strata of courts in Nigeria related to digital rights; elucidating on the interpretation of constitutional provisions and data protection regulations vis a vis digital right. It is hoped that this case review will generate even deeper conversation on the state of digital right protection regime in Nigeria with a view to making advancements in protecting the digital rights of Nigerians, build investor confidence and act in tune with International best standards.

2 https://www.echr.coe.int/Documents/Guide_Data_protection_ENG.pdf

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ONLINE EXPRESSION

Diana Ele Uloko v. Inspector General of Police[3]

On the 11th day of October, 2020, the Applicant, Diana Uloko, joined thousands of other Nigerian youths to exercise their fundamental rights to freedom of expression and association by participating in the "End SARS" protest in Abuja. The protests were held nationwide in expression of citizens' grievances against the numerous atrocities committed by the Nigerian Police Force against young Nigerians in the country.

During the protest, the Applicant made use of her Samsung mobile phone to record the protest and post pictures of same on social media to report the events. Whilst this was on–going, some officers of the Nigerian Police Force disrupted the protest and ambushed many protesters. In the process, while the Applicant's sister was apprehended and manhandled by the Police, the Applicant took out her phone to broadcast the harassment of her sister on social media, but the phone was seized by a Police Officer who destroyed her phone by smashing it with a stick. The Applicant also was also injured during this incident. Aggrieved by

3 Suit No. FHC/ABJ/CS/1519/2020. Delivered by the Federal High Court, Abuja Division Per. Hon. Justice J.T. Tsoho (Chief Judge) on the 26th day of August, 2021. Clifford Kalu Esq. for the Applicant, Respondent unrepresented.

the actions of the policemen, the Applicant filed an action against the Police claiming an infringement of her freedom of expression.

DECISION

In resolving the dispute submitted to it for determination, the court acknowledged that the primary claim before it was for a declaratory order, and held, in line with the established jurisprudence of the Supreme Court, that it must be established on the strength of the Applicant's case and not on the weakness of the Respondent's case. The Court further observed that this suit was properly commenced via originating summons – which is best suited for cases where there is no likelihood of controversial facts.

The Court however found that the Applicant failed to furnish ample evidence to establish her claim to the declaratory relief sought in the first prayer.

On the need to lead abundant and credible evidence in support of a claim for the enforcement of the constitutionally guaranteed fundamental right to freedom of expression:

> "For the abundance of caution, it is always good to place enough evidence for the court to evaluate even when it amounts to surplusage of proof..." (Page 10).

On the need to link the evidence before the Court to the pleadings of parties:

> "Moving on, it would seem that the same challenges are shared with the images of the bruises. The applicant pleaded the picture to show the bruises and injury she allegedly sustained following assault by the Respondent's

> officers. However, by itself, the image does nothing to proof what it was supposed to. There is no indication as to when that image was taken." (page 11)

In the final analysis, the Court held that "the applicant must satisfy the court by cogent, credible and convincing evidence that she is entitled to the declaratory relief as sought. So, as the applicant by her own evidence has failed to prove her claim for declaration, her claim must fail." (page 11). The Court consequently struck out the case.

COMMENTARY

This case was a golden opportunity for the court to recognize the importance of mobile phones and social media as a mode of exercising the fundamental right to freedom of expression. The Applicant's mobile phone is her medium of expression, and depriving her access to her mobile phone is effectively depriving her access to the enjoyment of her constitutionally guaranteed rights to express herself and communicate freely with other persons.

Sadly, the court chose to view this case restrictively from the lenses of a standard complaint against police harassment and intimidation. The court dismissed the claims on the grounds of insufficiency of evidence to link the Respondents to the Applicant's claims in spite of the Respondent's refusal to contradict the affidavit evidence before the court. The court, sadly, did not get around to consider the constitutional implications of the case.

Incorporated Trustees of Digital Right Lawyers Initiative (DRLI) v. Commissioner of Police, Delta State[4]

DRLI filed this fundamental rights enforcement suit on behalf of one Prince Nicholas Makolomi–a journalist who was arrested by officers of the Special Anti–Robbery Squad Operatives (SARS) of the Nigerian Police Force and transported from Ughelli to State CID Asaba for allegedly making a video recording of the SARS operatives leaving an injured citizen on the ground and fleeing with his car. It is of note that, it was this video footage that sparked the nationwide EndSARS protest of 2020.

When Prince Makolomi was arrested and detained indefinitely by SARS operatives for exercising his freedom of expression by posting the video footage online, DRLI filed an action to enforce his right to personal liberty since the Respondent refused to release him or charge him before a competent court.

DECISION

On the illegality of the arrest and detention of Prince Makolomi:

The court considered the affidavit in support of the originating motion filed by the Applicant and the counter–affidavit filed by the Police and found that:

> "... I am of the view that the subject of the application, Prince Nicholas Makolomi, was indeed arrested and detained for a period of at least 3 days before he was charged to court. I do not believe in the reliability of the

4 Unreported Judgement of the Federal High Court of Nigeria, Asaba Judicial Division, *Coram* Hon. Justice (Dr.) Nnamdi O. Dimbga, delivered on the 24th day of November 2020 in Suit No. FHC/ASB/CS/140/2020. I. M. Okobia, Esq. appeared for DRLI while F.N. Odunna, Esq. for the Respondent.

> counter affidavit of the Respondent. Looking at the tenor of the counter affidavit of the Respondent, it did not deny the fact that Prince Makolomi was arrested on the 5th day of October 2020. It merely stated that he was transferred to the State CID Asaba for discreet investigation on the 8t.h October, 2020 without stating the date when he was initially arrested, or refuting the claim in the supporting affidavit that the arrest occurred on the 5th of October, 2020... Even if I agree with the Respondent that the Applicant was arrested and transferred to Asaba on the 8th day of October and that he was charged to court on the same day that is still a period of 3 days meaning that the detention exceeded the period allowed by law." (pages 9 & 10).

On the violation of Prince Makolomi's right to personal liberty:

> "All the materials before me considered, I believe that the subject, Prince Nicholas Makolomi's right to personal liberty was indeed violated by the Respondent having not charged the subject to court within a period of 1 day as provided by section 35 of the Constitution since there is no contest that a court of competent jurisdiction exists within Ughelli from where the subject was initially apprehended, nor was he released in the context of an administrative bail when it was clear the Respondent was not going to be able to charge the subject to court." (pages 10 & 11).

On the law enforcement powers of the Police:

> "I agree that the Respondent in the exercise of their law enforcement powers can arrest and detain a suspect, but

> the suspect must be brought before a court of competent jurisdiction within one day where there is such a court within a radius of forty kilometres, and in any other case, within a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable. As I held in Suit No FHC/ABJ/CS/1051/2015, MR. SUNDAY OGABA OBANDE & ANOR V. MR. FATAI & 3 ORS, delivered on 26/01/2016, the requirement to release arrested suspects or charge them before a competent court promptly as required under section 35(4) & (5) of the Constitution, in my view, is only a logical expression of the presumption of innocence which [enures] to their benefit and guaranteed by section 36(5) of the Constitution." (page 11).

On reason for constitutional requirement to charge a suspect to court within a limited time:

> "Additionally, the courts are the umpires and are far removed from the facts of a case. It will be unfair to expect the law enforcement agencies which apprehended a suspect and are quite biased regarding the circumstances of the apprehension, to be the very ones who will determine the entitlement or otherwise of the Applicant to his liberty. And that is why the Constitution requires that the person must not be detained for more than a day without being charged to court where a court exist within 40 kilometres radius or a period of not more than 48 hours where none exists within a radius of 40 kilometres." (page 12).

On the whole, the court resolved the lone issue in favour of the Applicant, declared the arrest and detention of Prince Makolomi an interference

with his fundamental right to personal liberty, and awarded N200,000 as general damages against the Respondent.

COMMENTARY

This decision joins a long line of decisions for progressive protection of the fundamental rights of Nigerian citizens especially the freedom of expression online which right Prince Makolomi exercised when he posted the video footage on the Internet. Notably, the action was commenced by a right group on behalf of Prince Makolomi. This is possible and allowed in line with the innovation introduced by the Fundamental Rights (Enforcement Procedure) Rules, 2009 ("FREP Rules 2009") which allows for human right activists, advocates, or groups as well as any non–governmental organization to institute human rights action on behalf of any potential applicant[5]. This would not have been possible under the Fundamental Rights (Enforcement Procedure) Rules, 1979 which the 2009 Rules replaced.

The journalist was harassed by the security operatives for his dissemination of information to the citizens via social media and the Internet, hence, the judgment is a welcomed addition to the growing list of authorities on the enforcement of digital rights in Nigeria.

Incorporated Trustees of Media Rights Agenda v. National Broadcasting Commission[6]

FACTS

During the EndSARS Protest in 2020, some television stations reported

5 Preamble 3(e) to the FREP Rules 2009.

6 Unreported Judgement of the Federal High Court of Nigeria, Ibadan Judicial Division, *Coram* Hon. Justice J.O. Abdulmalik, delivered on 23.06.2021 in Suit No. FHC/IB/CS/101/2020. Boluwatife Sanya, Esq. for the Applicant and Akinkunmi Adekola, Esq. for the Respondent.

the events as they unfolded nationwide. When the Federal Government, through the National Broadcasting Commission fined the stations under the Nigeria Broadcasting Code for airing the protests, Media Rights Agenda–a civil society devoted to press freedom and sundry matters–approached the Federal High Court challenging the fine as arbitrary and an interference with freedom of expression and the press guaranteed by section 39 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) ("CFRN") and Article 9 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act ("ACHPRA") etc.

DECISION

On locus standi in an action for enforcement of fundamental rights:

> "Locus standi as it borders on actions commenced under Fundamental Rights (Enforcement Procedure) Rules 2009, is no longer an issue sufficient to bar the institution of fundamental rights cases. This principle was broadened by the Supreme Court in Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) 797, wherein the Court held that:–
>
> "It is the universal concept that all human beings are brothers assets to one another"." Per Eso, J.S.C. (as he then was) (page 10).

The Court referenced paragraph 3(e) of the preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009 which enjoins courts to encourage public interest litigation, and not to strike out any human right case for lack of locus standi. The section also provides for categories of people that can bring an action on behalf of an applicant to enforce his fundamental rights, including any person acting in the public interest.

Finally on locus standi, the court held that:

> "Without dissipating much energy, I hold that the Applicant/Respondent have the locus standi to institute this suit against the Respondent/Applicant. Therefore, this Court have the necessary jurisdiction to determine this suit".

On fulfilling condition precedent: filing of verifying affidavit in fundamental rights cases:

> "This observation was also held by the Court in the case of Groner & Anor v. EFCC (2014) LPELR–24466(CA), as follows:
>
> "In my view, what is important is the Rules is that the affidavit in support of the application be made by the applicant except he is in custody or unable to wear to it. The issue here is why the 2nd Applicant (appellant) failed to personally swear to the affidavit. It is immaterial whether it is an affidavit *simplicita* or a verifying affidavit."
>
> I therefore discountenance learned counsel Respondent/ Applicant's contention in this regard because, the records show that he Applicant/Respondent filed an eighteen paragraphs affidavit in support of his Originating process. That suffices in law." (page 14).

On the competence of the suit

> "After due consideration of the Originating process and its affidavit in support, I find the facts on which the reliefs are sought are speculative and do not yield for sound

> reasoning, how the fundamental rights of the Applicant have been encroached upon.
>
> The pith of the Appellant's alleged breach of their fundamental rights is predicated on speculation. For emphasis paragraph 15 of the affidavit reads again–
>
> 15. Morisola told me on phone on 29th October 2020 and I verily believe her that it must have been the sanction and fine imposed on Channels TV by the respondent alongside ARISE TV and AIT that made Channels TV not to broadcast the video she sent for EYE WITNESS REPORT.
>
> Conclusively, I adjudge that case of the Applicant is purely academic, devoid of any reasonable cause of action, incompetent and if allowed to proceed to hearing, it will amount to an abuse and waste of court's process." (pages 16).

COMMENTARY

The decisions of the court on the issue of locus standi in fundamental rights enforcement actions and filing of verifying affidavit are commendable. They tow the progressive line, and in alignment with the provisions of the Fundamental Right (Enforcement Procedure) Rules 2009 and judicial authorities.

However, I tend to respectfully disagree with the decision of the Court that the action was purely academic, devoid of any reasonable cause of action and incompetent, or at least. This is so because the Court came to this conclusion without due consideration of the third limb of the basis for application for enforcement of fundamental rights.

Section 46(1) of the CFRN provides three criterias for an applicant to enforce a fundamental right; (i) where a person alleges that any of the provisions of Chapter IV on fundamental rights has been contravened; (ii) where a person alleges that any of the provisions of Chapter IV is being contravened; and (iii) where a person alleges that any of the provisions of Chapter IV is likely to be contravened. The said section 46(1) of the CFRN provides that "Any person who alleges that any of the provisions of 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." The decision of the Court of Appeal in **Mirchandi v. IGP & Ors**[7] explains the three limbs of Section 46(1) of the Constitution.

In our own case, paragraph 12 of the Applicant's affidavit complies with the third limb of section 46 of the constitution which allows an applicant to institute a fundamental rights suit where there is a likelihood of infringement while paragraphs 13–15 are based on the first limb of the right haven been infringed.

We are however Sceptical that the Court would have held differently even if the Court had considered the third limb of the basis. This is so because in Mirchandi v. IGP & Ors (supra), the Court adopted the reasoning in Uzoukwu v. Ezeonu (1991) 6 NWLR (Pt. 200) 708 at 784 where it was held that "Before a plaintiff or applicant invokes the third limb, he must be sure that there are enough acts on the part of the respondent aimed essentially and unequivocally towards the contravention of his rights. A mere speculative conduct on the part of the respondent without more, cannot ground an action under the third limb."

However, the Court should still have considered the claim of the Applicant based on the third limb, for whatever it was worth. That would have provided guidance for the citizens on the quantum of likelihood of

7 [2021] LPELR–54016 (CA), 11–13, paras C–E.

injury that will sustain an application brought based on the third limb.

The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria[8]

On the 4th day of June 2021, the Federal Government of Nigeria announced the indefinite suspension of Twitter in Nigeria. Consequently, SERAP, a Non–Governmental Organization registered in the Federal Republic of Nigeria, filed a suit before the Community Court of Justice (ECOWAS Court) challenging the suspension as an infringement of Nigerian citizens' digital rights especially freedom of expression online.

The Applicant also filed along with the substantive suit, an application for interim provisional measures seeking to restrain the federal government of Nigeria from intimidating or harassing citizens using the Twitter app in spite of the suspension of its activities in Nigeria.

DECISION

On the effect of denial of access to Internet on the right to freedom of expression

The Court agreed with the Applicant's Counsel that the cause of action of this matter borders on freedom of expression which is recognized by the African Charter on Human and People's Rights to which the Respondent/Applicant is a party when the court ruled that:

> "Access to the internet though not a right, in the strict

8 Application No. ECW/CCJ/APP/23/21 Delivered by the Community Court of Justice of the Economic Community of West African States(ECOWAS) Abuja on Tuesday 22nd day of June 2021. Coram: Hon. Justice Gberi–Be OUTATTARA–Presiding, Hon. Justice Keikura BANGURA–Judge Rapporteur, Hon. Justice Januaria T. Silva Moreira COSTA–Member, Mr. Athanase ATANNON–Deputy Chief Registrar. Mr. Femi Falana, SAN, Oluwadare Kolawole and Opeyemi Owolabi for the Applicant, Memuna Lami Shiru (Mrs.). Enock Simon, Abdullahi Abubakar, Suleiman Jubril and Olatayo Afolabi for the Respondent.

sense, serves as a platform in which the rights to freedom of expression and freedom to receive information can be exercised, "**therefore a denial of access to the internet or to services provided via the internet, as** a derivate right, operates as denial of the right to freedom of expression and to receive information. This was adequately captured by the Court in its previous decision as follows:

"Twitter provides a platform for the exercise of the right to freedom of expression and freedom to receive information, which is fundamental human right and any interference with the access, will be viewed as an interference with the right to freedom of expression and information. By extension such interference will amount to a violation of a fundamental human right which falls within the competence of this Court pursuant to Article 9 (4) of the Supplementary Protocol (A/SP.I/ OI /05) amending the Protocol (A/Pl/7/91) relating to the Community Court Of Justice. Evidently, this situates the claim before the Court as one bordering on the Violation Of human rights which has occurred in a Member State.

"Noting that the Respondent has also argued that its' action is against a particular entity, Twitter and not the Applicant, and that the subject matter of the suit is therefore not for the enforcement of human rights, the Court is inclined to reiterate its competence. Article 9(4) of the Supplementary Protocol (A/SP. 1/01 /05) Amending the Protocol (A.'P I ,'7/91) relating to the Community Court Of Justice provides "The Court has jurisdiction to determine cases of violation Of human rights that occur in any Member State. It is trite that a

> mere allegation of a violation of human rights in the territory Of a Member State is sufficient, prima facie, to justify the Court's jurisdiction" (p.11)

COMMENTARY

This decision is a landmarking development to the human right jurisprudence in Africa. Most especially the decision of the court recognizing that denial of access to the Internet or to services provided via the internet, as a derivate right, operates as denial of the right to freedom of expression and to receive information.

This decision is instructive to the extent that, since Twitter as a platform is used by the citizens to exercise their right to freedom of expression including freedom to receive information, which is a fundamental human right, any interference with such access constitutes an interference with the right to freedom of expression guaranteed by the Nigerian constitution.

Rachel Ochanya Uloko v. Inspector General of Police[9]

FACTS

On the 11th October, 2020, the Applicant joined thousands of other Nigerian youths to exercise their fundamental rights to freedom of expression and association by participating in the "End SARS" Protest in Abuja, as a mode peacefully airing their grievances against the numerous atrocities committed by the Nigerian Police Force against young Nigerians over the country. During the protest, the Applicant made use of her Samsung Phone to take photographs and record the peaceful protest. Whilst this was on–going, some officers of the Nigerian

9 Suit No. FHC/ABJ/CS/1520/2020. Delivered by the Federal High Court, Abuja Division Per. Hon. Justice J.T. Tsoho (Chief Judge) on the 26th day of August, 2021. Clifford Kalu Esq. for the Applicant, Respondent unrepresented.

Police Force (Respondent) disrupted the protest and ambushed the protesters. The Applicant was apprehended, harassed and assaulted by the Police.

Aggrieved by the actions of the Policemen, the Applicant instituted this action against the Police vide an Originating Summons for the enforcement of her fundamental rights to freedom of expression and the press and claiming the sum of N10,000,000.00 (Ten Million Naira) in damages.

The Applicant submitted two questions for determination by the Court viz:

a. Whether or not by the interpretation and construction of Section 39 and 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 2009, the Respondent's officers harassment, intimidation, threatening and assault of the Applicant and further damage of the Applicant's mobile phone during the End SARS Protest in Abuja interfered with the Applicant's right to freedom of expression?

b. Whether or not the Applicant is entitled to damages sought?

The Respondent did not appear in Court or file any process despite service of numerous hearing notices on him. Clifford Kalu Esq. argued the motion on behalf of the Applicant on the hearing date.

DECISION

In resolving the issue placed before it for determination, the court admitted that the primary claim before it was for a declaratory order, and held, in line with the established jurisprudence of the Supreme Court,

that it must be established on the strength of the Applicant's case and not the weakness of the Respondent's case. The Court further observed that this suit was properly commenced via originating summons–which is best suited for cases where there is no likelihood for dispute of facts.

The Court however found that the Applicant failed to furnish ample evidence to establish her claim to the declaratory relief sought in the first prayer.

On the need to lead abundant and credible evidence in support of a claim for the enforcement of the constitutionally guaranteed fundamental right to freedom of expression:

> "For the abundance of caution, it is always good to place enough evidence for the court to evaluate even when it amounts to surplusage of proof..."

On the need to link the evidence before the Court to the pleadings of parties:

> "Moving on, it would seem that the same challenges are shared with the images of the bruises. The applicant pleaded the picture to show the bruises and injury she allegedly sustained following assault by the Respondent's officers. However, by itself, the image does nothing to proof what it was supposed to. There is no indication as to when that image was taken."

In the final analysis, the Court held that "the applicant must satisfy the court by cogent, credible and convincing evidence that she is entitled to the declaratory relief as sought. So, as the applicant by her own evidence has failed to prove her claim for declaration, her claim must fail."

The Court consequently struck out the case.

COMMENTARY

This case was a golden opportunity for the courts to recognize the importance of mobile phones as a mode of exercising the fundamental right to freedom of expression. The Applicant's mobile phone was her medium of expression, and depriving her access to her mobile phone is effectively depriving her access to the enjoyment of her constitutionally guaranteed rights to express herself and communicate freely with other persons.

Sadly, the court chose to view this case restrictively from the lenses of a standard complaint against police harassment and intimidation. The court dismissed the claims on the grounds of insufficiency of evidence to link the Respondent's to the Applicant's claims. It did not get around to consider the constitutional implications of the case. One can only hope that a more meticulous applicant seeking to enforce similar rights would overcome the evidentiary hurdles highlighted by the court in this case.

3

DIGITAL ASSETS

GOVERNOR OF CENTRAL BANK OF NIGERIA v RISE VEST TECHNOLOGIES LIMITED & ORS.[10]

FACTS

In 2021, the Central Bank of Nigeria approached the Federal High Court and obtained an interim order freezing the bank accounts of Rise Vest Technologies Limited and other companies for dealing in cryptocurrency et al. Upon receiving service of the order, the affected companies filed a Motion on Notice asking the court to set aside and/or discharge the interim freezing order on a number of grounds.

After hearing the parties, the court discharged the interim order.

DECISION

On the legality of dealing on Cryptocurrencies

10 Suit No. FHC/ABJ/CS/822/2021. Delivered by the Federal High Court, Abuja Division Per. Hon. Justice Taiwo O. Taiwo on the 18th day of October, 2021. Odiba Anthony, Esq appeared for the Central Bank of Nigeria while Seni Adio, SAN and Matthew Onoja appeared for the Defendant/Applicant

> "With due respect to the learned counsel to the Respondent, there is no reference by the learned counsel to any law on which the allegation is based or that it is illegal in Nigeria to deal in cryptocurrency as at now... It must be noted however that the court cannot base its decision mainly on public policy." (p. 9–10)

COMMENTARY

The facts of this case go to prove once again the extent of abuse of powers by government agencies–in this case the Central Bank of Nigeria. There is absolutely no provisions in the BOFIA Act or any other existing law that empowers the Central Bank of Nigeria or any other government agency (ies) to sanction dealings with cryptocurrencies.

I agree with the reasoning of the court in setting aside the interim freezing orders of 17th August 2021 because laws are meant to be obeyed. It remains a trite principle of law that the courts will not countenance any alleged infraction of the law where such an act is not frowned at by a written law. Unless and until the National Assembly passes a law declaring dealings on cryptocurrencies as illegal, the position remains that transactions on cryptocurrencies are legal and should be respected.

4

PRIVACY AND DATA PROTECTION

Digital Rights Lawyers Initiative v National Identity Management Commission[11]

FACTS

In 2020, the 2nd Appellant–a Nigerian Citizen approached the National Identity Management Commission (NIMC) for the rectification of his date of birth on his National Identification Number (NIN) slip. To grant the 2nd Appellant's request, NIMC demanded the sum of N15, 000 (Fifteen thousand Naira) as provided by its policy on management of citizens' identity.

The Appellants consequently approached the Federal High Court sitting in Abeokuta, Ogun State challenging the demand for money as violating right to privacy guaranteed by section 37 of the Constitution of the Federal Republic of Nigeria, 1999.

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11 (2021) LPELR–55623 (CA). Delivered by the Court of Appeal, Ibadan on Friday 24th day of September 2021. Coram: Ugochukwu Anthony Ogakwu, Folashade Ayodeji Ojo and Abba Bello Mohammed, JJCA. Solomon Okedara and Olumide Babalola for the Appellant, Dotun Isola–Osobu for the Respondent.

At the trial court, the Appellants invited the court to resolve the following questions:

1. Whether or not by constitution of section 37 of the constitution of the Federal Republic, 1999 (as amended), the Respondent's act of demanding for payment for rectification/correction of personal data is likely to interfere with the Applicant's right to private and family life?

2. Whether or not by the provisions of article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR), the Applicant can request for rectification/correction of personal data from the Respondent free of charge?

When the trial court upheld NIMC's objection to its jurisdiction, the Appellants appealed to the Court of Appeal sitting in Ibadan, Oyo State. Olumide Babalola settled the Appellants' brief of argument, but the appeal was argued by Solomon Okedara–both co–founders of DRLI.

DECISION

Although the court dismissed the appeal, the judgment made some far–reaching resolutions of issues bordering on privacy and data protection in Nigeria as follows:

On the relationship between privacy and data protection:

> "But the meaning and scope of 'privacy of citizens' as guaranteed by the section has not received clear definition/interpretation in the constitution. The trial court had, in my view, rightly held that the right to 'privacy of citizens' as guaranteed under the section includes the right to protection of personal information and personal

data.' (page 19)

On the objective of the Nigerian Data Protection Regulation (NDPR):

> "As rightly observed in paragraph 26 of the Appellant's brief of argument, the preamble of the NDPR 2019 indicates that the NDPR was made as a result of concerns and contribution of stakeholders on the issue of privacy and protection of personal data." (page 21)

On nexus between NDPR and right to privacy under the constitution:

> "On the relationship between the NDPR 2019 and section 37 of the CFRN 1999, it is pertinent for me to state that the CFRN 1999 makes provision in chapter IV guaranteeing the various fundamental rights of citizens. But as I stated earlier, the nature and scope of those rights and even their limitations are in most instances, furthered by other statutes, regulations or other legal instruments. It is in this instance that the NDPR must be construed as providing one of such legal instruments that protects or safeguards the right to privacy of citizens as it relates to the protection of their personal information or data which the trial court had rightly adjudged at page 89 of the record to be part of the right to privacy guaranteed by section 37 of the CFRN." (page 22)

On whether of data breach can bring joint application for enforcement of fundamental rights:

> "As rightly printed out by learned Counsel for the

> Appellants, the decisions in Udo v Robson (supra) and Kporharor v Yedi (supra) which based its decision on the 1979 FRER Rules, this case which is clearly bought under the FRER Rules 2009 is distinguishable.

The decision of this Court in Kporharor's case (supra) is the current decision of this Court. By the doctrine of stare decisis I am bound by the earlier decision of this Court. I cannot deviate from it.

As rightly pointed out by the learned Counsel for the Appellants, the decision in Udo v Robinson (supra), relied on the earlier decision of this Court in Kporharor v Yedi (supra), which based its decision on the 1979 FREP Rules, this case, which is clearly brought under the FREP Rules, 2009, is distinguishable.

There is no doubt that in section 46(1) of the 1999 Constitution which grants right of action in fundamental rights enforcement it used the singular language. The section used the words "Any person who alleges..." However, it is trite law of interpretation of statutes that words in the singular which are used in a statute are interpreted to include the plural and words in the plural to include the singular. ...

From the above provisions of the 2009 FREP Rules and the Supreme Court decision on interpretation of statutes in Udeh v The State (supra), it is expressly clear that it is not only individuals that can institute an action for enforcement of fundamental rights. As rightly contended by the learned Counsel for the Appellants, the approach of the courts has generally been to give vent to the intendment of the Fundamental Rights (Enforcement Procedure) Rules, 2009, to the effect that several parties may institute fundamental rights proceedings provided the basis of the complaint arose from the same cause of action.

This position has been given vent by the recent decision of this Court

in the case of Olumide Babalola v AGF (2018) LPELR–43808 (CA) ... It must also be pointed out that whilst the decision of this court in Kporharor's Case (Supra) Which Was Followed In Udo v Robson (Supra) were Essentially Based on the 1979 FREP Rules, The Decision In Olumide Babalola V Agf & Anor (supra), was based on the 2009 FREP Rules, which is the extant applicable procedure for enforcement of fundamental rights actions.

Beyond this court, the Supreme Court had tacitly in its recent decisions countenanced joint applications in fundamental rights cases. In Diamond Bank Plc v Opara & 2 Ors (2018) LPELR–43907(SC), which is an appeal an appeal arising from a fundamental rights joint application initiated at the Federal High Court, Port Harcourt, the Supreme Court upheld the judgment of this court which granted the prayer of the Applicants. Also in FBN PLC & 4 ORS V AG Federation (2018) 7 NWLR (Pt. 1617) 121, the Apex Court upheld the judgment of this Court in joint application by 5 applicants for enforcement of fundamental rights and even awarded compensation to the 5th Applicant which this Court omitted to award.

It is instructive to state that those decisions of the Apex Court have invariably reinforced the preamble of the FREP Rules, 2009 which allows for joint fundamental rights applications, as well as the provisions of Section 14 of the Interpretation Act which requires that in the interpretation of Section 46(1) of the 1999 Constitution, the singular word "any person" should be construed to include "persons"

I need to add that no set of cases foster public confidence in the judiciary as an adjudicatory system of redress, than fundamental rights cases. This is primarily because most human rights enforcement cases are complaints by seemingly "weak" individual members of the public against apparently "powerful" state actors. For this reason, a narrow interpretation of Section 46 of the 1999 Constitution and the FREP Rules, 2009 that springs which restricts access in fundamental rights

proceedings to only individuals will unduly retard the objective of ensuring the promotion and due observance by all, of the fundamental human rights so constitutionally guaranteed." (Page 34 to 40)

COMMENTARY

This decision represents a watershed in the history of data protection in Nigeria. Although the court dismissed the appeal, its resolution of the relationship between data protection and right to privacy is very instructive and valuable for litigating data protection in the Nigerian courts.

The judgment also represents the first appellate court decision on the nature and objectives of the Nigeria Data Protection Regulation (NDPR) as a (subsidiary) legislation that complements the right to privacy guaranteed in the Nigerian Constitution. However, the court's conclusion that a suit that borders on the exercise of data subject's right to rectification of personal data has nothing to do with right to privacy leaves so much to be desired especially having established the link between the concept of data protection and notion of privacy.

The court started on a good wicket when it identified the relationship and interoperability between the NDPR and right to privacy (see page 22) but later in the judgment altered its position when it agreed with the trial court that rectification of date of birth has nothing to do with right to privacy (page 28). This position disturbingly negates the Court of Appeal's finding that the provisions of the NDPR fall under the right to privacy under the Constitution.

As celebrated as this decision appears, it seems to have taken with another hand, what it gives with one hand. If the court can hold that a suit bordering on data subject's right to rectification of personal data has nothing to do with right to privacy, then one can only hope that

this decision does not constitute a readymade shield to subsequent suits seeking to enforce other data subject's rights in court under the fundamental rights enforcement procedure.

Incorporated Trustee of Digital Rights Lawyers Initiative (DRLI) v Central Bank of Nigeria (CBN)[12]

FACTS

On the 6th day of August 2020, a commercial bank (First Bank of Nigerian Plc.) hosted a virtual Financial Technology Summit themed "How Blockchain and Artificial Intelligence will Disrupt Fintech in Nigeria". During the summit Central Bank's Director for payment system management, Mr Musa Jimoh announced that "the Central Bank of Nigeria (Respondent herein) has directed commercial banks to share their customers' data with financial technology (Fintech) companies.

DRLI consequently approached the court challenging the directive as a likely interference with customers' right to privacy guaranteed under the Section 37 of the Constitution of the Federal Republic of Nigeria and relevant provisions of the Nigeria Data Protection Regulation.

The Respondent raised a preliminary objection on the following grounds:

1. By the provision of section 53 (1) of the Banks and other Financial Institution Act, Section 52 of the Central Bank of Nigeria (Establishment) Act, 2007, the suit cannot be maintained against the Respondent.

2. By the provision of article 2.2 (e) of the Nigeria Data Protection Regulation 2019 and section 33 (1) (a) of Central Bank of Nigeria

12 Unreported Suit No. FHC/AB/CS/76/2020, Delivered by Hon Justice J. O. Abdulmalik of the Federal High Court, Abeokuta on 25th November, 2021. A. S. Shuaib Esq for Applicant and Olalekan Ashas for Respondent.

(Establishment) Act 2007, the suit did not discloses a reasonable cause of action.

After hearing the parties, the court however upheld the preliminary objection and dismissed the substantive suit.

DECISION

Notwithstanding the dismissal of the substantive application, the judgment of the court made some pronouncements on right to privacy and data protection in Nigeria as follows:

On the core objectives of the FREP rules;

> "Firstly, it must be stated that core objectives of the FREP Rules 2009 are stipulated in preamble 3 (c) to wit:–
>
> "*(c) For the purpose of advancing byt never for the purpose of restricting the Applicant's rights and freedoms, the may make consequential orders as may be just and expedient*."
>
> As such, the above objective is aimed at enhancing access to justice for all persons who desire to enforce their fundamental rights..." (page 16)

On whether status of limitation affects an application for enforcement of fundamental right;

> "...it is no wonder the provision of Order 3 Rule 1 of the FREP Rules 2009. It provides;
>
> "*An application for enforcement of Fundamental Right shall not be affected by any limitation statute whatsoever*."

> See El Rufai V Senate of The National Assembly & Ors (2014) LPELR–23115 (CA)... flowing from the above position of the law, I find that, no limitation clause can frustrate a case of the fundamental rights enforcement suit of any party." Pages 16–17

On whether the Respondent can make validly directive to commercial banks to share data to third party without consent of data subject;

> "I find that a community reading of Regulation 2.2 (e) of Nigeria Data Protection Regulation 2019 and Section 2 (d) of the C.B.N. Act 2007 avails the Respondent/Applicant's directive, unless and until the Applicant/Respondent shows the contrary, which he has not done, due to his failure to expose that Respondent/Applicant's directive was not done in good faith, I hereby discountenance Applicant/ Respondent's issues one and two." Pages 18–19.

On the Power of C.B.N. to share information;

> "...I hold simpliciter, that Section 33 (1) (a) of the C.B.N. Act 2007, would mean "all Information" received by Respondent/Applicant could be used in the interest of the society, and same provision is apposite to this suit. See Chief Obafemi Awolowo v. Alhaji Shehu Shagari and 2 Ors (1979) All NLR 120." Page 20.

On what applicant must show to prove interference with data subject's rights;

> "More so, the deponent left in abeyance how the

> Respondent/Applicant's directive will interfere with his right to privacy guaranteed under the Nigeria Data Protection Regulation and section 37 of the Constitution. No doubt, this is a salient fact which ought to have be particularized. The case of Peak Merchant Bank Limited v. C.B.N. & Ors (2017) LPELR 42324 (CA) captures the importance of stating the facts of bad faith as follows;
>
> "the elements and/or particulars that constituted the bad faith is not alleged clearly or definitely (positively) in the statement of claim."
>
> It was held by the Apex court in the case of N.D.I.C. V. C.B.N (supra) in pages 297 that "... in order that the court may have jurisdiction to entertain the type of action now in question, the Plaintiff/Respondent has to show or alleged bad faith in the way the revocation was done and indicate the elements that constitute bad faith... unless bad faith is positively alleged by way of its elements... an allegation without its elements cannot be regarded as positive."" Page 24–25.

COMMENTARY

Although the suit was dismissed, the few pronouncements on data protection gives some form of encouragement that our courts are now giving due cognizance to the concept of data protection as covered by the notion of privacy under section 37 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended). This can be seen as expressed by the court in the case in view when it held thus; "More so, the deponent left in abeyance how the Respondent/Applicant's directive will interfere with his right to privacy guaranteed under the Nigeria Data Protection Regulation and Section 37 of the Constitution." (see

page 24 of the judgment)

Also, with due respect to the learned Judge of the Federal High Court, I beg to differ with the court when it held that: "I find most conscientiously that there is no way the existence of a reasonable cause of action can be evaluated and determined without the consideration of whether there exist bad faith. Therefore, the onus is on Applicant/Respondent to depict the evidence of "bad faith" occasioned by the directive given by the Respondent/Applicant, is deeply submerged with the determination of whether a reasonable cause of action have been established...".

It is my respectful submission here that, for a cause of action to be established under the FREP Rules 2009, Order II Rule 1 provides that "Any person who alleges that any of the Fundamental Right provided for in the Constitution or African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled **has been, is being, or is likely to be infringed**, may apply to the Court in the where the infringement occurs or is likely to occur, for redress..."

Since the Court of Appeal has ruled in another case that data protection and privacy as a fundamental right, then once fundamental rights are likely to be infringed and as such, it is expected that steps be taken to prevent the occurrence of the infringement, then a victim can approach the court for redress irrespective of whether or not the infringer has bad faith/intentions. However, where it affects public interest as in the case in view, the court should guide itself by balancing the effect of the likely harm against the proposed gains of 'not preventing' it. Proof of bad faith should not be a precondition in fundamental right cases, as such violates the intendment of the Constitution in protecting the right of its citizens which stands above all other rights. With respect to the court, the cases cited in support of the decision are not fundamental right cases and should not be applied as such.

Incorporated Trustees of Digital Right Lawyers Initiative v. L.T. Solutions & Multimedia Limited[13]

FACTS

On the 2nd day of May 2020, LT Solutions Multimedia Limited, through its Twitter handle tweeted that: "over 200 million fresh Nigerian and international emails lists, sorted by age, state, LGA, city, industry etc send a dm or call 08139745545 to get yours". The privacy policy published on the company's website showed that the Respondent collects personal data of citizens but it did not explain how data subject's consent were sought and obtained among other deficiencies.

At the High Court of Ogun State, DRLI filed an action claiming among other things that: data protection is guaranteed under the right to privacy in section 37 of the CFRN and the Respondent's processing of data of over 200 million Nigerians without legal basis violates the provisions of the NDPR and likely to interfere with their right to privacy.

DECISION

The Applicant submitted four (4) issues for the determination, but the court re–couched the issues into three (3) and decided the matter on the basis of those issues.

On whether the right to privacy extends to protection of personal data:

The court referred to **Nwali v. Ebonyi State Independent Electoral Commission & Ors**[14] for the proposition that the court has no power

13 Unreported Judgement of the High Court of Ogun State, Abeokuta Judicial Division, *Coram* Hon. Justice O. Ogunfowora, delivered on the 9th day of November 2020 in Suit No. HCT/262/2020. Olumide Babalola appeared for DRLI, but the Respondent was unrepresented.
14 [2014] LPELR–23682

to restrict the phrase "privacy of citizens" to specific situations but must interpret it generally, liberally, and expansively. The court also referred to some sector–specific regulations in relation to data protection to establish that the regulations made pursuant to section 37 of the CFRN show that the provisions are to be interpreted expansively and liberally to ensure the privacy of citizens. The court then reproduced the preamble to the NDPR and its objectives and found that:

> "In the light of the above, I thus also have no hesitation in holding that the right to privacy extends to protection of a citizen's personal data such [has] been alleged that the Respondent has violated or is threatening to violate as I now go on consider whether the Respondent has indeed violated the Applicant's right to privacy or threatens to violate it." (page 7).

On whether the Respondent failed to comply with the provision of the NDPR:

The court relied on Article 2.5 of the NDPR in resolving this issue. The said Article 2.5 provides thus:

> "Notwithstanding anything contrary in this Regulation or any instrument for the time being in force, any medium through which personal data is being collected or processes **shall** display a simple and conspicuous privacy policy that the class of data subject being targeted can understand. The privacy policy shall in addition to any other relevant information contain the following ..." (page 7).

In deciding whether the Respondent complied with the above provision of the NDPR, the court referred to depositions in the affidavit in support

of the Applicant's originating motion to the effect that the Respondent was processing the private data of citizens without legal basis and without compliance with the NDPR. The court held that "Since no counter affidavit or any other processes have been filed by the Respondents, it means that the Applicant only needs minimal proof of the facts in respect of the reliefs claimed in this suit."

The court held further thus:

> "Firstly, I agree with the Applicant that the Respondent qualifies as a data controller under section 1.3(g) of the NDPR Regulations, as members of the Applicant will also qualify as data subject under section 1.3(k) of the Regulations. I have also painstakingly gone through the facts in support of this Relief, as contained in the above–mentioned paragraphs and Exhibits 2 and 3, and I am also constrained to agree with the Applicants that the Respondent as a Data Controller has failed to comply with the Regulations by its failure to publish a privacy policy as provided under section 2.5 of the Regulations showing the requisite information requested therein." (page 9).

On whether the Respondent violated the right of the Applicant:

> "I am however unable to agree with the Applicant that this infraction of the Regulations by simply failing to publish a privacy policy impinges on the privacy rights of the members of the Applicant without a clear and unambiguous deposition that the Respondent as a Data Controller failed to obtain the consent of data subject (such as any of the Applicant's members) in contravention of the provisions of Section 2.3 of the

Regulations relating to the procuring of consent which is reproduced hereunder as follows:

Section 2.3 Procuring Consent

No data shall be obtainable except the specific purpose of collection is made known to the Data Subject.

Data Controller is under obligation to ensure that consent of a Data Subject has been obtained without fraud, coercion or undue influence, according ...

The point I am struggling to make is that, notwithstanding the fact that I have found that the Respondent failed to comply with the law by publishing its privacy policy, the nature of these proceedings not being criminal or quasi criminal in nature, but one for the determination of whether the right of privacy guaranteed under section 37 of the Constitution has been infringed or is likely to be infringed it behoves the deponent to the Applicant's affidavit in support to further show clearly how this failure to publish its privacy policy infringed this right to privacy as this failure simpliciter does not show an infringement of the right to privacy without an unambiguous deposition that any data subject's information has been processed without his (or her) consent. I am thus unable to find that the right to privacy of the Applicant's members have been infringed or is likely to be infringed."

On whether the court would order the Respondent to comply with the provisions of the NDPR or find the Respondent liable to pay a fine:

> "...my earlier position that this is not a criminal or quasi criminal nature robs this Court of the jurisdiction to determine these issues, and perhaps more importantly, this Court as a State High Court will lack the jurisdiction to determine these issues having regard to the fact that these Regulations are made by a body established by an Act of the National Assembly i.e. a Federal legislation and not under a State Law as it is trite that unless a Federal Act permits a State High Court to determine the infractions under these Regulations such as are applicable by statutory provisions for trials under the Robbery and Firearms Act for trials of Armed Robbery cases, or maters prosecuted under the Economic and Financial Crimes (EFCC) Act and Independent Corrupt Practices Commission (ICPC) Act. It is the Federal High Court that will thus have jurisdiction to determine this issue and I believe more appropriately upon the filing of criminal charges by the relevant government Agency, presumably the NITDA against transgressors of the Regulations which must necessarily arise after the arraignment of such transgressor including plea taking.
>
> The Reliefs related to these issues are thus liable to be struck out."

In all, relief 1 was granted, reliefs 2, 3, and 4 were dismissed, while reliefs 5 and 6 were struck out.

COMMENTARY

This is the first decision of a court in Nigeria to hold that the rights of data subjects under the NDPR are part of the right to privacy and family life under section 37 of the CFRN. Shortly after this decision, the Federal High Court took a contrary view in Incorporated Trustees of Laws and Rights Awareness Initiative v. The National Identity Management Commission (ITLRAI v. NIMC)[15] that a breach of the rights of a data subject under the NDPR is not necessarily a breach right to private and family life under section 37 of the CFRN. Hence, an action for the interpretation of the provisions of the NDPR cannot be brought under the FREP Rules.

However, the conflicting positions in this judgment and the decision in ITLRAI v. NICM have now been settled by the decision of the Court of Appeal in Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v. National Identity Management Commission[16], wherein the Court of Appeal held that personal data protection as provided in the NDPR generally falls under the fundamental right to privacy guaranteed in section 37 of the CFRN. This remains the law until an appeal from the decision or any other decision to the Supreme Court is decided against the position of the Court of Appeal.

It is our view that the court took into consideration wrong factors in holding that it lacks jurisdiction to order the Respondent to comply with the NDPR or be fined. One would have thought that the finding of the court that the rights to privacy under the CFRN extends to the rights of data subjects under the NDPR, implies that an action for breach of such would be cognizable under the FREP Rules 2009 which defines "court" as the Federal High Court, High Court of a State or High Court of the Federal Capital Territory, Abuja[17].

15 Suit No. FHC/CS/79/2020 (unreported).
16 [2021] LPELR–55623(CA).
17 Order I Rule 2 of the FREP Rules 2009.

It our respectful view that a controller's liability for failure to fulfill its duty to clearly publicize its privacy policy is different from its duty to obtain consent of data subjects under the NDPR and same ought not be fused or confused as done in this judgment. Under the NDPR, the requirement to procure consent for processing of personal data[18] is different from the requirement to publicize clear privacy policy.[19]

Even with or without obtaining consent, a breach of the requirement to publicize privacy policy alone, in our respectful view, makes the Respondent liable to fine and even criminal prosecution in addition to the fine as the NDPR provides. Article 2.10 of the NDPR provides for the penalty of fine in addition to other criminal liability. This again is a point the court missed as the court made it seem that criminal charges must be pressed before a person in breach of the provisions of the NDPR is fined. It is our respectful view that, fine in this circumstance is an administrative punishment as obtainable in other jurisdictions rather than a criminal sanction.

The holding of the court that the deponent of the affidavit in support of the originating summons ought to have deposed to facts that the Respondent did not obtain the consent of Applicant's members before processing their data, with respect, lost sight of the earlier finding of the court that the rights of data subject under the NDPR are part of the right to privacy in section 37 of the CFRN.

That pronouncement of the court did more than a mere christening of the rights under the NDPR, it exalted those rights to the prestigious status of fundamental rights guaranteed by the CFRN, and in enforcing fundamental rights, a citizen does not have to wait until the rights are actually violated, a citizen could sue once he alleges that any of his rights has been, *is being or likely* to be contravened[20].

18 Article 2.3 of the NDPR.
19 Article 2.5 of the NDPR.
20 Section 46(1) of the CFRN.

Finally, this decision and the decision of the Court of Appeal in *Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v. National Identity Management Commission* put Nigeria on the right track by adopting a human right–based approach to data protection which is now a global trend in data protection. At the global stage, the discourse has progressed past data protection being a part of privacy, to constructing an entirely new fundamental right known as the fundamental right to data protection, distinct and independent of the right to privacy.

Incorporated Trustees of Digital Rights Lawyers Initiative v. Minister Of Industry, Trade And Investment & 2 Ors.[21]

FACTS

In 2020, the Federal Government of Nigeria through the Ministry of Industry, Trade and Investment, set up a Micro Small and Medium Enterprise (MSME) Survival Fund. Applications for the grant were made through an online portal hosted as https//www.survivalfund.gov.ng through which personal data (including Bank Verification Number (BVN) and other sensitive data of Nigeria citizens that applied for the said federal government funds were processed.

In September 2020, some members of DRLI sought to apply for the Survival Fund online and discovered that the 1st Respondent did not comply with the NDPR as they failed to publish a privacy policy or notice on the portal hosted online. Also, the Ministry neither appointed a data protection officer (DPO) nor developed any security measures to protect data, store data securely in the said online application portal. DRLI consequently approached the court on behalf of its members, claiming that the Respondent has violated the provisions of the NDPR

21 Unreported Case Suit No. FHC/AWK/CS/116/2020, Delivered by the Federal High Court, Awka Judicial Division on Tuesday 2nd day of November 2021. Coram: Justice N. O. Dimgba,. Izuckuwu Umeji, Esq., for the Applicant, Oluwafemi Kolusade for the Respondent.

and interfered with the right to privacy of its members.

DECISION

In granting all the reliefs sought by DRLI, the court held as follows:

On who is a Data Controller

> "I have carefully examined the NDPR particularly Regulations I.l(a),2.1(d), 2.1(3), 2.3(b), 2.5, 2.6, and 3.1(7) outlined above and spelling out the obligations of data controllers and duties of data subject, as well as exhibits 3–6 which is an electronic document generated from the Applicant's computer on the MSME Survival Fund application portal of the 1st Respondent. First, I quite agree with Applicant that indeed the 1st Respondent is a data controller by virtue of Regulation 1.3(x) NDPR which defines a data controller as "a person who either alone, jointly with other persons or in common with other person or a statutory body, determines the purpose for and the manner in which persona/ data is processed or to be processed. (p.18)

On when a Data Controller will be held liable for breach of data privacy of a data subject

> The 1st Respondent did not deny the Applicant's case by providing any evidence to show that the obligations set out above as a data controller were complied with. The Applicant furnished the Court with Exh.3–6 which are photographs of the MSME Survival Fund Program online portal and in them I see that neither of the obligations required of the 1st Respondent by the NDPR

> were complied with. The 1st Respondent beyond saying generally in Paragraph 9 and 10 of the counter affidavit that the portal was set up and being used with all security measures and statutory provisions regarding the privacy of data being collected, and that the operation of the survival fund were transparent and available to members of the public, it did not provide any details to demonstrate or prove compliance with the privacy protecting and securing measures outlined in the Regulations.
>
> All things considered, I hold that the failure of the Respondents, from taking measures towards protecting the data privacy of the citizens, taking into account the vital information required from the data subject such as the Bank Verification Number, names and addresses, poses a threat to the Applicant's members right to private and family life owing to the fact that the objectives of the NDPR as provided in Regulation 1.1 is to safeguard the rights of natural persons to data privacy. (p.20)

COMMENTARY

This decision represents another watershed in the history of data protection in Nigeria in the sense that, the court pronounced that threat to data privacy of citizen amounts to breach of fundamental right to private and family life.

It is the first decision where the Nigerian court would rule on the importance of publication of a privacy policy and its impact on data protection and privacy rights. The court categorically held that the non–publication of the privacy policy among other things, violated the provision of the NDPR and interfered with the right to privacy guaranteed under section 37 CFRN.

INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE V. NATIONAL COMMUNICATIONS COMMISSION[22]

FACTS

In 2019, the National Communications Commission (NCC) introduced a (draft) Internet Industry Code of Practice which empowers the NCC to unilaterally issue a takedown order to Internet Service Providers (ISP) to shutdown certain websites without recourse to court order.

DRLI consequently challenged the document in court seeking the following reliefs:

1. A declaration that by section 7.3 of the Respondent's establishment of Internet Industry Code of Practice on take down notice (the "**Draft Code**") is likely to violate the Applicant's fundamental right to expression and the press guaranteed under Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "**Constitution**").

2. A declaration that the Respondent's plans to unilaterally issue takedown notice to any Internet Access Service providers (IASP) without Court orders is likely to violate the Applicant's fundamental rights to expression and the press guaranteed under Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the "**Constitution**").

3. Perpetual injunction restraining the Respondent, its officers and/or representatives from issuing takedown notices to Internet Services Providers (ISPS) without a Court order.

22 Suit No. FHC/ABJ/CS/56/2019. Delivered by the Federal High Court, Abuja Division, on Tuesday, the 30th day of June 2020 per Hon. Justice N. E. Maha. Olivia Audu, Esq., for the Applicant, Amaitem Ita Etuk, Esq., for the Respondent.

In response, the NCC filed a Notice of Preliminary Objection challenging the jurisdiction of the Court on the grounds of lack of locus standi, non–disclosure of cause of action, irregular procedure, the main relief sought is not cognizable under fundamental rights enforcement procedure and non–fulfilment of condition precedent.

DECISION

Although the Court agreed that DRLI possessed the requisite locus standi to commence this suit, the court however dismissed the suit for being speculative, frivolous and an abuse of court process as the Applicant is challenging a draft Code which has neither been gazetted nor passed into law, as such, has no force of law at the time of filing the suit.

COMMENTARY

Although the court struck out the suit, the holding that the Applicant has the locus standi to bring this action is in line with existing judicial authorities and is therefore commendable. However, the decision of the Court declining jurisdicition on the ground that the document is a draft Code, which had not come into force at the time as same has neither been gazetted nor passed into law, is with respect to the court, an interesting and curious one.

In arriving at that conclusion, the Court failed to consider the provision of section 46(1) of the Constitution that: "Any person who alleges that any of the provisions of 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." (Emphasis supplied) A similar provision is contained in Order 2 Rule 1 of the FREP Rules and has been restated in a plethora of judicial decisions.

With respect to the court, the position of our laws is that, where a person

anticipates that his fundamental right may be interefered with, the person can approach the court for redress and the court can come to the person's aid and make the necessary orders. Had the court considered this position of law, it would have arrived at a different decision.

Moreover, a legislative instrument may still have the force of law even where same has not been gazetted and regulatory agencies can issue codes by way of subsidiary legislations and the codes will be binding and enforceable within the relevant industry without being formally enacted by the National Assembly. This position is supported by the decision of the Court of Appeal in the case of **Deaconess Felicia Ogundipe v. The Minister of Federal Capital Territory** (2014) LPELR–22771 (CA).

Given the foregoing, the decision of the court in this case that the draft Code has neither been gazetted or enacted into law, and as such cannot be a ground for a fundamental rights action, with respect to the court, falls short of established legal principles and creates a bad precedent for fundamental right actions.

INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE & 2 OTHERS V. NATIONAL IDENTITY MANAGEMENT COMMISSION[23]

FACTS

Sometime in February 2020, Mr. Atayero (the 2nd Applicant) approached the National Identity Management Commission (NIMC) for the rectification of his date of birth on his National Identification Number (NIN) slip. To grant the 2nd Applicant's request, NIMC demanded the sum of N15, 000 (Fifteen thousand Naira) as provided by its policy on

23 Suit No. AB/83/2020. Hon. Justice A.A. Akinyemi delivered on the …… Olumide Babalola for the Applicants and A. K Isola–Osobu for the Respondent

management of citizens' identity.

The Applicant consequently approached the High Court sitting in Abeokuta, Ogun State challenging the demand for money before rectification of his personal data as a violation of their right to privacy guaranteed by section 37 of the Constitution of the Federal Republic of Nigeria, 1999 and Article 3.1 (1) (7) (h) of the Nigeria Data Protection Regulation 2019. The court was invited to resolve the following questions:

1. Whether or not by construction of section 37 of the constitution of the Federal Republic, 1999 (as amended), the Respondent's act of demanding for payment for rectification/correction of personal data is likely to interfere with the Applicant's right to private and family life?

2. Whether or not by the provisions of article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR), the Applicant can request for rectification/correction of personal data from the Respondent free of charge?

The Court in delivering its judgment per Hon. Justice A.A Akinyemi without delving into the main issue struck out this suit while upholding the objections of the Defendant.

DECISION

Although the court dismissed the suit on three grounds without delving into the main suit, nonetheless a part of the judgment made some far–reaching resolution of issues bordering on right to privacy and data protection in Nigeria as follows:

On the relationship between privacy and data protection, the trial court found that:

"The kernel of both the provision of section 37 of the constitution and these illuminating decisions is, to my mind, that privacy if a citizen of Nigeria shall not be violated. From these decisions, privacy to my mind can be said to mean the right to be free from public attention or the right not to have others intrude into one's private space uninvited or without one's approval. It means to be able to stay away or apart from others without observation or intrusion. It also includes the protection of personal information from others. This right to privacy is not limited to his home but extends to anything that is private and personal to his including communication and personal data.' (page 8)

COMMENTARY

Thankfully, the Court in its resolution at page 8 of its judgment identified that the right to personal data is part of the right to privacy as enshrined under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Shockingly, the same court went further to say that the demand for payment of N15, 000 for correction of the date of birth of the 2nd Applicant has absolutely nothing to do with his privacy. (see page 12).

The court arrived at this decision without attempting to look at the provisions of article 3.1 (8) of the NDPR which gives data subjects the right to obtain from a Controller without undue delay the rectification of inaccurate personal data concerning him or her. The court also failed to consider that the objective of the NDPR is to safeguard the right to privacy as captured under section 37 of the constitution.

The conflicting position of the trial court on this issue can only lead to further confusion unless and until the Supreme Court takes a position on the right to data protection as an extension of the right to privacy.

Digital Rights Lawyers Initiative v National Youth Service Corps[24]

FACTS

Sometime in 2020, the Respondent coerced Corps members especially the most recent corps members i.e. Batch B Stream 1, to sign Data Subject Consent Forms on the eve of their passing out as a precondition for their final discharge in Oyo State and other states of the Federation. The personal data collected from the Corp members were subsequently published in magazines which bear the names, phone numbers, image photographs and other personal information of the Corp members.

DRLI consequently challenged the act as a violation of the certain provisions of the NDPR and section 37 of the Constitution which guarantees right to privacy. The court was invited to resolve the following questions:

a. Whether or not by the interpretation of Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and articles 1.1 (a), 2.1 (a) 2.2 & 2.3 of the Nigeria Data Protection Regulation 2019, the Respondent's processing of NYSC Corp members personal data in an End of the Year Service Magazine/Photo Album without their freely given consent constitute a violation of the Corp members' right to privacy?

b. Whether or not by the interpretation of article 1.3 (iii) of the Nigeria Data Protection Regulation 2019, the Respondent's "Data Subject Consent Statement" attached as a condition for Discharge Certificate qualifies as freely–given consent?

24 Suit No. AB/207/2020. Judgment delivered by the High Court of Ogun State, Abeokuta Division per Hon. Justice A. O. Onafowokan on the 28th January, 2021. Olumide Babalola Esq. for the Aplicant and O.V. Iweze Esq. for the Respondent.

After hearing the parties, the court dismissed the suit but made some pronouncement on issues bordering on privacy and data protection.

DECISION

Although the court dismissed the suit, the trial court made a slight pronouncement on a novel area of data protection in Nigeria especially on data subject's consent as follows:

On locus standi to strategically litigate data protection, the court observed

> "It pertinent to state that paragraph 3(e) of the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009, read as follows;
>
> "The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non–governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
> *(i)* Anyone acting in his own interest;
> *(ii)* Anyone acting on behalf of another person;
> *(iii)*Anyone acting as a member of, or in the interest of a group or class of persons;
> *(iv)*Anyone acting in the public interest, and
> *(v)* Association acting in the interest of its members or other individuals or groups"

Predicated on the above, the Applicant has instituted this suit on behalf

of 2019 Batch C Corp members of the Respondent". (Pages 16–17)

On nexus between Nigeria Data Protection Regulation 2019 and right to privacy under the constitution:

"Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

> "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected".

There is no gain to say that Fundamental rights are constitutionally guaranteed and protected with a specific provision preserving same as specified in the Constitution, which provides that, in case of a breach of that right, the person aggrieved can approach the High Court for redress. See Section 46(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). However, it must be said that these fundamental rights entrenched in Chapter IV (Four) of the Constitution are not always absolute in so far as they co–exist with other validly made laws" (e.g. Nigeria Data Protection Regulation 2019)" (pages 17–18).

On whether Section 20 of the National Youth Service Corp Act divest the court to entertain an action for enforcement of fundamental rights of a Corp member:

> "It apt to settle the preliminary issue of jurisdiction raised by learned counsel of the Respondent in his submission in opposition to this suit. In the case of UBA v Johnson (2018) LPELR–45073 (CA) the Court of Appeal held as follows:
>
> "Following from all that has been said above, and as it

> is glaring that it is not the intendment of the FREP Rules that the enforcement by a person of his fundamental right is to be subjected to the fulfilment of any condition precedent whatsoever, once the proceeding is initiated by a process accepted by the trial Court, it becomes obvious that Appellant issue 5 must be and is hereby resolved against them".

In that wise I hold that section 20 of the National Youth Service Corp Act, Cap N84, LFN, 2004 cannot divest this court of the jurisdiction to entertain this suit. *(page 18–19)*

On when a Controller may be held to have properly obtained Data subjects' consent under the NDPR

> "A look at Exhibit 2 not only reveals a consent form, but it also contains leeway for the 2019 Batch B Stream 1 Corp members to waive their consent at any time, by use of DATA SUBJECT WITHDRAWAL FORM... (page 20)...
>
> In the instance of this case, I hold squarely that the Exhibit 2 is not an infringement of Applicant fundamental rights encapsulated in Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and the Exhibit 2 have not exposed at all that the applicant were railroaded into a straitjacket all for the sake of their graduation/passing out certificate". (page 21)
>
> "Pointedly I find that Exhibit 2 annexed to the Originating Summons have fully complied with the Nigeria Data Protection Regulation 2019. And crucial to set out is Article 2.3 (2) (c) to wit:–"Prior to giving consent, the

> Data subject shall be informed of his right and method to withdraw his consent at any given time. However, the withdrawal shall not affect the lawfulness of processing based on the consent before its withdrawal". (page 22)

COMMENTARY

This decision represents another milestone development in the history of data protection in Nigeria. Although, the court dismissed the suit, its resolution on how a data controller can satisfy the provision of the NDPR with respect to data subjects consent. While the suit also confirms DRLI's locus standi to strategically litigate digital rights under the FREP Rules, it is ultimately hoped that it will serve as a caution to the government agencies and other private institutions that processe citizens' personal information without consent or other lawful basis as required by law.

INCORPORATED TRUSTEES OF DIGITS RIGHTS AND LAWS INITIATIVE V HABEEB OLASUNKANMI RASAKI[25]

FACTS

This suit was filed by DRLI on behalf Mr. Leslie Aihevba against the Respondent who has printed various Whatsapp conversations of the former over a period of time. Due to the sensitive nature of the conversations, DRLI approached the court to estop the Respondent from further processing (especially sharing and use) of the Whatsapp messages.

DRLI submitted the following questions for determination:

a. Whether or not by the interpretation and construction of

25 Suit No. AB/207/2020. Judgment delivered by the High Court of Ogun State, Abeokuta Division per Hon. Justice A. O. Onafowokan on the 28th January, 2021. Olumide Babalola Esq. for the Aplicant and O.V. Iweze Esq. for the Respondent

paragraph 3(e)(v) of the Preamble to the Fundamental Rights Enforcement Procedure Rules and Section 46 of the Constitution 1999 (as amended) and article 4.8 of the NDPR the Applicant has locus standi to commence action for and on behalf of Mr. Leslie Aihevba.

b. Whether or not by the construction of article 1.1(a) of the Nigerian Data Protection Regulation 2019 and section 37 of the Constitution (as amended) data protection is guaranteed under right to private and family life.

c. Whether or not the applicant is entitled to the reliefs sought.

The Respondent filed a counter affidavit and written address in opposition, contending inter alia, that the primary relief sought by the Applicant was not cognizable under the Fundamental Rights Enforcement Procedure Rules and the court resolved the suit on this sole issue alone.

DECISION

The court dismissed the action after making a preliminary finding that the applicant's major reliefs are not enforceable under an action for the enforcement of fundamental rights.

On the nature of Fundamental Rights Enforcement Procedure Actions

> "The Fundamental Rights Enforcement Rules may be activated by any person who alleges that any of the Fundamental Rights provided for in the constitution or African Charter of Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed,

> such a person may apply to the court in the state where the infringement occurs or is likely to occur; for redress. In effect, by section 46(1) of the 1999 constitution, a person whose fundamental right is breached, is being breached or about to be breached may apply to a High Court in that state for redress."

On nature of Principal relief in a claim for the enforcement of fundamental rights

> "It is settled in a plethora of cases that when an application is brought under the Fundamental Rights (Enforcement Procedure) Rules, a condition precedent to the exercise of the jurisdiction of the court is that the enforcement of fundamental rights or the securing of the enforcement of same must be the main claim as well as the ancillary claim. Where the main claim or principal claim is not the enforcement or securing the enforcement of fundamental right, the jurisdiction of the court cannot be properly exercised and the action will be incompetent."

On Whether action for the interpretation of the Nigeria Data Protection Regulation qualifies as a fundamental rights enforcement action

> "I have closely examined the two reliefs being claimed and I cannot agree more with the respondent's counsel that the principal relief is not for the enforcement of the fundamental right, rather, as exemplified and amplified by the two questions posed by the applicant for determination, it is about the interpretation and construction of article 1.1(a) and 4.8 of the Nigeria Data Protection Regulation (NDPR) 2019 and the locus of

> the applicant to enforce the supposed right to privacy of an individual. As a consequence, the claim is not cognizable under the Fundamental Rights (Enforcement Procedure) Rule 2009 and the court has no jurisdiction to entertain it."

COMMENTARY

This judgment was delivered in January 2021, 6 years after the Court of Appeal conclusively affirmed the status of the right to privacy as a fundamental right in **Nwali v EBSIEC & Ors. (2014).** The court, with greatest respect, did not direct its mind to the earlier jurisprudence of the Court of Appeal, or properly appreciate the succinct issues submitted for determination and thus missed a glorious opportunity to expand data protection jurisprudence.

At any rate, the ratio of the court herein does not represent the correct position of the law on the status of the NDPR as an instrument that enforces the right to privacy as a fundamental right. The later decision of the Court of Appeal in **Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v NIMC (2021) LPELR-55623(CA)** represents the current position of the law wherein the court recognized data protection under the NDPR rights as an extension of the right to privacy guaranteed by section 37 of the Constitution.

Incorporated Trustees of Digital Rights Lawyers Initiative v. Unity Bank Plc[26]

FACTS

DRLI instituted this action for the benefit of job Applicants whose personal data were exposed by Unity Bank on their job portal in 2020 claiming a number of reliefs for the alleged data breach pursuant to relevant provisions of the NDPR.

The Respondent filed an objection to the suit on the ground of lack of locus standi and failure to fulfill necessary condition precedent for initiating the suit under the NDPR. The court consequently dismissed the suit on the preliminary objection.

DECISION

On whether a suit brought pursuant to the NDPR can be filed under fundamental rights enforcement procedure

> "It is clear therefore that applicant/respondent must allege that any of his rights contained in chapter four was/were contravened or infringed upon, is being infringed or is likely to be contravened. Therefore, before any action can be brought under the Fundamental Rights Enforcement Rules, 2009, they must primarily be reliefs that alleged breached of a fundamental right." (page 17).
>
> "Without delving into the merit of the substantive suit of whether section 37 of the 1999 Constitution can apply,

26 Unreported Judgement of the Federal High Court of Nigeria, Abeokuta Judicial Division, *Coram* Hon. Justice Ibrahim Watila delivered on 9 December 2020 in Suit No. FHC/AB/CS/85/2020. Olumide Babalola, Esq. for the Applicant. The Applicant instituted the action on behalf of data subjects whose personal data were exposed by Unity Bank Plc, the Respondent.

> assuming without saying that it can apply, all these facts simply show that the enforcement of human right is not the principal relief but ancillary relief in this instant application." (page 19).
>
> "I have carefully perused the facts of this case and the reliefs sought in respect thereof. It is clear to me that the principal or main claim of the applicant relates to the purported exposure of personal data of 53,000 by the respondent in line with the Nigeria Data Protection Regulation 2019. I hereby hold that this instant application is not proper to be brought under Fundamental Rights action." (pages 20 and 21).

On DRLI's locus standi to institute the action on behalf of the 53,000 data subjects:

> "However, my concern is that the applicant has not shown sufficient interest to show that he is not just a meddlesome interloper. If and truly, 53,000 personal data of persons were breached, how come none of the said data subject is before the court? assuming but not saying that the instant action is breach of fundamental rights of such huge number of persons as in this case, how come there is no complaint or evidence of the existence of such persons before the court.
>
> Moreso, does the act of the purported exposure of data comes within the purview of public interest litigation as envisaged by section 46(1) of the 1999 Constitution and the Fundamental Right Enforcement Procedure Rules? From the facts and the evidence before the court, I do not think so. It is also notable that the applicant is basing this

instant application on section 37 of the 1999 constitution as well as section several provisions of the Nigeria Data Protection Regulation 2019. However, it should be said that fundamental right actions are sui generis and in a class on its own." (page 23).

On whether the Administrative Redress Tribunal is a condition precedent to the filing of cases under the NDPR

"Regulation 4.2 of the NDPR provides thus–

"(1)Without prejudice to the right of a Data Subject to seek redress in a court of competent jurisdiction, the Agency shall set up an Administrative Redress Panel under the following terms of reference;

(2) Investigation of allegations of any breach of the provisions of this Regulation;

(3) Invitation of any party to respond to allegations made against it within seven days;

(4) Issuance of Administrative orders to protect the subject–matter of the allegation pending the outcome of investigation;

(5) Conclusion of investigation and determination of appropriate redress within twenty–eight (28) working days; and

(6) Any breach of this Regulation shall be construed as

> a breach of the provisions of the National Information Technology Development Agency (NITDA) Act of 2007." (page 24)
>
> "The provision of the above Nigeria Data Protection Regulation 2019 is clear as to how to proceed against a breach, it is not a mere irregularity that can be dispensed with. The arguments of the applicant as to statute of limitation are misconceived and irrelevant. Since the applicant/respondent has failed to comply with the provision of section 4.1(8) of the NDPR, this court is divest of jurisdiction to adjudge this matter. I so hold." (page 25).

COMMENTARY

In this case, the court's decision on the relationship of data protection and right to privacy was one of the conflicting decisions on nature of the concept of data protection before the decision of the Court of Appeal on the issue in Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v National Identity Management Commission[27] which resolved the conflict by holding that data protection right falls within the scope of the right to privacy and family life under section 37 of the CFRN. Earlier, in Incorporated Trustees of Digital Rights Lawyers Initiative v. L.T. Solutions & Multimedia Limited[28], the Ogun State High Court *coram* Ogunfowora, J., had also held that the right to privacy under section 37 of the CFRN includes data protection under the NDPR.

The decision of the court on the lack of locus standi on the part of the Applicant is rather curious, especially so because the court recognized and reproduced the provision of section 3(e) of the preamble to the FREP

27 [2021] LPELR–55623(CA).
28 Suit No. AB/83/2020 (unreported).

Rules which encourages courts to welcome public interest litigations and not to dismiss or strike out public interest actions on the ground of lack of locus standi. The said paragraph 3(e) of the preamble to the FREP Rules provides for classes of applicants in human rights litigation which are (i) anyone acting in his own interest, (ii) anyone acting on behalf of another person, (iii) anyone acting as a member of, or in the interest of a group or class of persons, (iv) anyone acting in the public interest, and (v) association acting in the interest of its members or other individuals or groups.

The court on one hand, held that "From the foregoing it is obvious that the applicant can have the locus standi to bring this action under (iv) and (v) but on the other hand, the same court surprisingly concluded that: "... the applicant has not shown sufficient interest to show that he is not just a meddlesome interloper."

With respect to the court, it is my respectful opinion that, the erstwhile rigid concept of "sufficient interest" or "interest" which underlines the traditional concept of locus standi is what paragraph 3(e) of the preamble to the FREP Rules seeks to downplay, otherwise the provision of paragraph 3(e)(iv) and (v) of the preamble to the FREP Rules will hardly ever be enforceable.

More astonishing are the reasons the court relied on. First, that none of the 53,000 data subjects whose rights were violated was before the court, and second, that the act of purported exposure of data did not come within the purview of public interest litigation envisaged in section 46(1) of the CFRN. Contrariwise, in **Centre for Oil Pollution Watch v. NNPC**[29] the Supreme Court recognized that:

"One of the features of this type of litigation is that the victims are often groups of persons who would not ordinarily be in a position to approach

29 [2018] LPELR–50830(SC), 98–112, paras F–F.

the court on their own due to impecuniosity or lack of awareness of their rights."

It is therefore surprising that the court expected that some of the 53,000 persons whose rights were allegedly infringed, ought to be before the court. The court's second reason that data privacy breach litigation does not fall under an action in section 46(1) of the CFRN to bring it within public interest litigation under the FREP has been addressed and overtaken by the Court of Appeal's decision in **Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v National Identity Management Commission** (supra) wherein the court clarified the NDPR vis a vis right to privacy.

On condition precedent to enforcing a right under the NDPR in court, I am of the respectful view that, the court was wrong in concluding that the Applicant ought to have reported the alleged breach to the Administrative Redress Panel before instituting the action in action. The court's decision is not supported by the express wording of regulation 4.2 (1) of the NDPR which provides that: "Without prejudice to the right of data subject to seek redress in a court of competence jurisdiction, the agency shall set up an Administrative Redress Panel under the following terms of reference..."

The court was wrong in holding that this provision constitutes a condition precedent for instituting an action to enforce any of the rights under the NDPR, for at least three reasons. First, the regulation employs the phrase "without prejudiceand in Acmel (Nig.) Ltd v. F.B.N. Plc[30], the Court of Appeal held that the words "without prejudice" means without loss of any right, in a way that does not harm or cancel the legal rights or privileges of a party. This shows that, the provision of article 4.2 of the NDPR is not intended to cancel out the right of a party to seek redress before a court until any mechanism is exhausted.

30 [2014] 6 NWLR (Pt. 1402) 158 at 180, paras C–D.

Second, the provision indeed does not provide for a data subject to report any alleged breach to the Administrative Redress Panel, the provision simply empowers the National Information Technology Development Agency ("NITDA") to set up an Administrative Redress Panel and provides for what the roles of the Administrative Redress Panel would be. It is therefore amazing how the court interpreted a section which empowers the NITDA to establish an Administrative Redress Panel, as a condition precedent for enforcing any right under the NDPR. The provision does not say anything a data subject is to do before instituting an action to enforce his rights under the NDPR.

Third, the position of the law is that for a statute to place a condition precedent to the right of access to court as enshrined in section 6(6)(b) of the CFRN, the statute must be constitutional, legal, and express. In **Unilorin & Anor v. Oluwadare**[31] the Court of Appeal held that:

"Finally on this point, we must remember that section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999, guarantees uninhibited right to every person to go to court seeking a determination of any question as to his civil rights and/or obligations. It is my view that for any condition precedent to the exercise of that constitutional right to be effective it must be constitutionally, legally, and expressly provided."

From the foregoing, I am of the respectful view that article 4.2 of the NDPR was not intended to be a condition precedent to the enforcement of any right under the NDPR. Conversely, if it was so intended, then it fails the test of expressivity set out in the decision in Unilorin & Anor v. Oluwadare (supra).

31 [2002] LPELR–7179(CA), 23–25, paras E–A.

INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVE V. NATIONAL IDENTITY MANAGEMENT COMMISSION[32]

FACTS

In 2020, the National Identity Management Commission rolled out digital identity cards on Google store and an official of the Federal Government of Nigeria went on social media advising people to download their national identity cards (digital IDs) on the software application.

Within 24 hours of the announcement, many Nigerians complained about the porous security features of the digital IDs and data breaches that led to some people being given other citizens' information on their digital IDs.

DRLI consequently approached the court principally seeking "A declaration that the Respondent's processing of the digital identity cards via their software application (NIMC app) is likely to interfere with Daniel John's right of privacy as guaranteed under article 1.1(a) of the NDPR 2019 and Section 37 of the Constitution" among other reliefs.

DECISION

On a whether an action can be brought on behalf of a data subject for breach of the NDPR

> "Having read and digested the above provisions, I am of the opinion that the Applicant cannot choose and pick which statute is favourable to him while neglecting

32 Suit No.: FHC/AB/79/2020. Delivered by the Federal High Court, Abeokuta Division, on Wednesday 9th day of December 2020 per Ibrahim Watila, J. Olumide Babalola for the Applicant, Adedotun Isola–Osobu, Esq. for the Respondent.

> salient part of the statute. By regulation 4.2(6): Any breach of this Regulation shall be construed as a breach of the provisions of the National Information Technology Development Agency (NITDA) Act of 2007.
>
> This provision takes it out of the purview of fundamental right action, therefore only a data subject can legally sue for breach of his data and that can only be done under the Nigeria Data Protection Regulation/NITDA Act, 2007" (see page 16)

COMMENTARY

With respect to the court, this decision represents another unfortunate step to defeat a valid complaint made to the Court regarding data breach and redress. While it is conceded that the Court's decision is based on a number of binding judicial decisions (which are not necessarily apt), it is submitted that the jurisprudence in fundamental rights actions ought to depart from situations where such applications are defeated on technical grounds, such as locus standi (with or without the presence of the complainant whose right has been infringed) to ensuring that decisions in fundamental right matters meet the substantial justice of the case. The latter is the intendment of the FREP Rules 2009.

As such, a community reading of the overriding objectives of the Rules contained in paragraph 3 (a) of the preamble will show that the intention is to advance and realise but not to restrict the rights contained in Chapter IV of the Constitution of the Federal Republic of Nigeria, the provisions of the African Charter on Human and People's Rights and other municipal, regional and international bills of rights.

The above view is supported by the dictum of **Nweze, JSC** in **Kalu v.** STATE [2017] 14 NWLR (Pt. 1586) 522, 544–545 where His Lordship

stated that issues around fundamental rights should not be subjected to the austerity of tabulated legalism. In fundamental rights cases, it is enough that an applicant's complaint is understood and deserves to be entertained.

Thus, the way the court is approached (including the couching reliefs) ought not to defeat such matters. See **Federal Republic of Nigeria v. Ifegwu [2003] 15 NWLR (Pt. 842) 113**, per **Uwaifo, JSC** (as he then was). Conclusively, one would have expected that even if the Court was of the view that a breach of NDPR is only actionable as a breach of the NITDA Act of 2007, the Respondent's action would have been examined in the light of section 37 of the Constitution, since the Applicant brought the suit under both the NDPR and the Constitution.

Suit No. IKD/3191GCM/2019. Judgment delivered by the High Court of Lagos State, Ikorodu Division Per Jon. Justice I. O. Akinkugbe on the 24th October, 2021.

See Olumide Babalola, *Casebook on data protection* (Noetico Repertum, Lagos, Nigeria) 490

HILLARY OGOM NWADEI V GOOGLE LIMITED LIABILITY COMPANY & ANOR[33]

FACTS

The Applicant, a Priest and Lawyer was charged to the Lancashire Court o England for assault in 2015 and thereafter convicted and sentenced to 8 months jail term which ended that same 2015.

During and after Mr. Nwandei's trial, convinction and jail term, many

33 Suit No. IKD/3191GCM/2019. Judgment delivered by the High Court of Lagos State, Ikorodu Division Per Jon. Justice I. O. Akinkugbe on the 24th October, 2021.

bloggers and news outlets reported the news and thoses reports were frequently accessed on Google search engine. The availability of these news on Google's platform prevented Mr. Nwandei from gaining employment after he left his last job in the United Kingdom.

The Applicant consequently instituted an action at the High Court of Lagos State claiming, inter alia, that having completed his 8 months jail term in England, he was therefore entitled to the unfettered enjoyment of his constitutional rights to privacy and the dignity of his human person. He also alleged that the Respondents have threatened his rights to privacy and the dignity of his human person by making the information of his arrest, subsequent trial and conviction available to the whole world on social media four years after the completion of his sentence, and also injunctive orders to restrain the Respondents from further making available on their platforms the information relating to his arrest and conviction. In other words, Mr Nwadei sought to enforce his data protection right to be forgotten.

The 1st Respondent challenged the Applicant's action, by a counter–affidavit and written address, wherein they responded that they (Google) did not publish any information about the Applicant and had no control over any information posted about the Applicant, and could therefore not edit any information posted by third parties. The 1st Respondent further contended that the information about the Applicant's arrest and conviction already formed part of the public record in England and the Applicant could therefore not expect to have a right of privacy in respect of such information and that any publication of same does not violate his rights to human dignity.

DECISION

The Court found that the Applicant had placed insufficient evidence before it to support his claims, and therefore dismissed the application.

On the need for Applicant to adduce sufficient evidence to prove claim:

> "It is not sufficient evidence I hold, for the applicant to just state that his fights have been violated, there must be cogent evidence placed before the court to support the reliefs being sought. The evidence being relied upon to support the facts in the supporting affidavit are clearly Exhibits A, B, and C, especially Exhibit A, the alleged offending article circulating on the internet allegedly made available to the world at large by the 1st respondents search Engine, has to be paced before the court to enable the court to reach a just determination. This was not done."

On importance of Further Affidavit in proving claims

> "The applicant by not refuting the 1st respondent's facts stated in the counter affidavit that they were not responsible for the information posted about his arrest and arraignment by a further affidavit, being a search engine has not shown how the 1st respondent has wronged him I hold by violating the fundamental rights allegedly violated. It is the law that a person cannot sue someone who has done him no wrong. SEE REBOLD INDUSTRIES LIMITED V MAGREOLA & ORS (2015) LPELR–24612 (SC) and it is settled law that facts not denied are deemed admitted."

COMMENTARY

This case presented a very rare opportunity for the Court to examine the data protection "right to be forgotten", but the failure of the Applicant's counsel to diligently place proper evidence before the court and to respond to the counter depositions of the respondent robbed the court of the opportunity to explore the concept at all.

Curiously, inspite of the fact that the suit was filed in 2019, none of the reliefs claimed referenced the Nigeria Data Protection Regulation (NDPR) under which the right to be forgotten can be conveniently invoked invoked. Although the second relief references 'right to private life', the Applicant did not satisfactorily relate it to right to be forgotten and that may explain the court's disposition as well.

Admittedly, Mr. Nwandei's reliefs, on the surface but impliedly speaks to the right to be forgotten, the originating processes did not explore the dynamics of the right in any material respect. Suprisinly, notwithstanding Google's admission that it could well de–reference such damaging stories,

the Applicant failed to address how his case could be accommodated under the broad categories of persons who can enforce the European–styled right to be forgotten as first introduced in the famous decision of Google Spain v AEPD case.34

INCORPORATED TRUSTEES OF DIGITAL RIGHT LAWYERS INITIATIVE V NIGERIAN INTERBANK SETTLEMENT SYSTEM AND ORS (FHC/KD/CS/2020)

In compliance with the Central Bank of Nigeria's directive to deposit money banks and other financial institutions to establish modalities for providing access to customers' Bank Verification Numbers, amongst other issues, the Nigerian Inter Bank Settlement System, the primary vehicle through which the directive was to be implemented, established a database for customers' BVN and modalities for accessing same in violation of the Nigerian Data Protection Regulation 2019–the law that regulates privacy and data protection issues in Nigeria.

When the failure was discovered, the Digital Right Lawyers Initiative–a foremost Digital Rights advocacy group in Nigeria, instituted an action at the Federal High Court on behalf of its members and the public who were likely to be affected by the failure to comply with the law.

In a judgment delivered on the 10th December, 2021, the Federal High Court dismissed the suit for want of jurisdiction. This review assesses the reasoning behind the court's decision and provides an analysis on why a different path ought to have been taken by the court.

SUMMARY OF FACTS OF THE CASE

The Incorporated Trustees of the Digital Right Lawyers Initiative, instituted an action to protect the rights of its members from the

34 See Olumide Babalola, *Casebook on data protection* (Noetico Repertum, Lagos, Nigeria) 490.

anticipated breach of the right of its members to privacy and exposure of Nigerians' data to unwanted access as a result of the Respondents' failure to comply with Data Protection laws. In response, the Respondents challenged the jurisdiction of the Applicants to maintain the action. They contended among other issues that the Applicant lacked the locus to maintain the suit and does not have the authority to sue, the suit did not disclose a reasonable cause of action and the Applicant failed to comply with condition precedent by not filing a pre–action notice. The Applicant in response, contended that actions to enforce the fundamental rights of individuals or groups do not require the establishment of locus standi and compliance with pre–action protocols. They also contended that their locus to institute the action is inherent in the fact that the suit was a public interest litigation where locus is not required to be established. The Applicant also contended that since it maintains a nation–wide membership, it did not matter that the suit was not instituted where its registered office is located and more so, the breach could occur in any part of the country.

THE COURT'S DECISION

In determining the objection raised against the competence of the suit, the court, after defining what amounts to locus, held thus

> "... a closer perusal at (sic) the oral submission of the 2nd Respondent counsel, it was submitted that the applicant is only in court or(sic) a voyage of discovery as the said regulation which the applicant relied on vehemently has not come into effect and there is nothing before the honourable court to challenge that fact. The applicant did not state the said regulation that the 1st and 2nd Respondents have violated nor did he attach same... it is pertinent to state that the Preliminary objection of the Respondents success (sic) as the applicant has no locus

standi within which to stand and institute the action.."

With the above pronouncement, the court dismissed the suit.

COMMENTARY

In taking the above decision, the court applied the law wrongly to the case before it. First, as clearly demonstrated in the Applicants' case, the suit was instituted to prevent an anticipated breach of the rights of Nigerians to data privacy. There need not have been an actual violation of the rights of members of the NGO or Nigerians before the right to institute an action for redress accrues. The law is trite and embedded in the grundnorm that a person who anticipates the violation of his constitutionally guaranteed right can institute an action to protect same. This was the unmistakable decision of the Appellate Court in **FRN AND ORS V ABACHA AND ORS**[35].

It follows that a breach does not have to occur before the right to institute a fundamental right action accrues. This is where the court erred in my view. Again, the court seemed to have confused Cause of Action with Locus: two terms with different meanings under the law. While the former indicates that a person must have a set of facts or circumstances that give the right to sue namely: the existence of a legal right and the violation or expected violation of same, the latter means that one must have the right or "standing" in law to sue. The court, in the case under review seemed to have held that the applicants did not disclose the existence of a legal right which would be wrong in the circumstance for as explicated above, an applicant seeking the enforcement of his fundamental right does not need to wait till the right is violated. In the extant case, the Applicants had demonstrated that the Respondents were involved in the making of a regulation that exposed the data of Nigerians to violation. The Applicant as a public interest litigation did

35 (2014) LPELR 22355 CA.

not need to demonstrate any particular interest in the matter before taking action.

The court also hinged its decision on the ground that the Nigerian Data Protection Regulation, 2019 which the Applicant complained, was violated was not attached to the Affidavit in support of the Application. In its view, the failure to so do indicated that the Applicant did not show how a violation of the law had occurred. This is in my view a rather befuddling position to take. The law is crystalized in a galaxy of decisions that statutes are not meant to be attached as Exhibits or tendered in court for the court is said to take judicial notice of statutory texts. By the clear wording of section 122 (2) of the Evidence Act[36], the court is expected to take judicial notice of 'all laws or enactment and any subsidiary legislation made under them having the force of law...."

It follows that the refusal to attach the regulation ought not to have been a ground to decline jurisdiction as the court has done. It is my humble but firmly held view that unless the position taken by the court in this case is corrected on appeal, it may set a dangerous precedent and spell a rather steeper path in the already uphill task that public interest litigation in Nigeria faces.

36 Evidence Act, Law of the Federation, CAP E11 2011.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON THURSDAY, THE 26TH DAY OF AUGUST, 2021
BEFORE HIS LORDSHIP, HON. JUSTICE J.T. TSOHO
CHIEF JUDGE

SUIT NO: FHC/ABJ/CS/1519/2020

BETWEEN:
DIANA ELE ULOKO — APPLICANT

AND

INSPECTOR GENERAL OF POLICE — RESPONDENT

JUDGMENT

Dated 6/11/2020 but filed 13/11/2020 is the Applicant's Originating Summons by which she seeks the enforcement of her fundamental rights in the following terms:

a) A DECLARATION that the Respondent's officers harassment, intimidation, threatening and assault on the Applicant and further damage of the Applicant's Samsung mobile phone during the 'End SARS' protest in Abuja interfered with the Applicant's right to freedom of expression and the press guaranteed under Section 39 of the Constitution of the Federal Republic of Nigeria, 1999(as amended).

b) GENERAL DAMAGES in the sum of N5, 000,000 (Five Million Naira only) as compensatory damages for the violation of the Applicant's fundamental rights.

c) **CONSEQUENTIAL ORDERS the Court may deem fit to give in the following circumstances.**

The Applicant further submitted two questions for the Court to determine, to wit:

i. **Whether or not by the interpretation and construction of Section 39 and 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009, the Respondent's officers harassment, intimidation, threatening and assault of the Applicant and further damage of the Applicant's Samsung mobile phone during the 'End SARS protest in Abuja interfered with the Applicant's right to freedom of expression?**

ii. **Whether or not the Applicant is entitled to damages sought?**

The Summons is supported by a statutory statement which consists of the Name, Description and the Reliefs sought by the Applicant. There are Six grounds upon which the reliefs are sought.

i. **The Applicant is a Nigerian citizen residing in the Federal Capital Territory Abuja.**
ii. **The Respondent is a Government Law enforcement agent and the head of the Nigerian Police Force, and is also saddled with the responsibility of**

providing security, peace and stability in the country.

iii. Officers of the Respondent on the 11th day of October, 2020 during the "End SARS" protest in Abuja, harassed, intimidated, threatened, assaulted the Applicant and further damaged the mobile phone of the Applicant thereby causing bodily harm to the Applicant and damage of the Applicant's property.

iv. The Applicant on the said day was only exercising her fundamental rights guaranteed by Sections 39 and 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

v. The Officers of the Respondent in a bid to carry out their constitutional duties, clearly refused to obey the provisions of Sections 39 and 46 of the Constitution.

vi. Sections 39 and 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees and provides for the Fundamental Right to Freedom of Expression and the Press.

Also, an Affidavit of 16 paragraphs was deposed to on 13/11/2020 by Charles Eshiet, a Legal Researcher with the Digital Rights Lawyers Initiative with the consent and authority of the Applicant and that of his Employer. Accompanying the Affidavit are documents marked as Exhibits 1 and 2. Exhibit 1 are printouts of some of the social media posts of the Applicant while Exhibit 2 are the pictures of injury and the Applicant's damaged phone. The

Applicant also filed a Certificate of Compliance with Section 84 of the Evidence Act, 2011; Affidavit of Non-Multiplicity of Suit and a Written Address.

It is important to note that this Suit is not contested. Hearing Notice was first served on the Respondent Inspector General of Police on the 24/11/2020 while the originating process had been earlier served on them and duly received with the stamp of the Commissioner of Police Legal Prosecution Section Force CID, Abuja. Further, Hearing Notices were also served on the Respondent for the Court's hearing of 21/12/2020 and 18/2/2021 respectively.

In the Written Address, the Applicant formulated two issues for the determination of this Court.

1. **Whether or not by the interpretation and construction of Sections 39 and 46 of the CFRN 1999 (as amended) and Order 2 Rule 1 of the FREPR, 2009, the Respondent's officers harassment, intimidation, threatening and assault on the Applicant and further damage of the Applicant's Samsung mobile phone during the 'End SARS' protest in Abuja interfered with the Applicant's right to freedom of expression?**
2. **Whether or not the Applicant is entitled to all the reliefs sought?**

On issue 1, the Applicant first highlighted the importance of fundamental rights as inalienable and sacrosanct and that when Applicants approached the Courts for the

enforcement of their rights, the Court must within reasonable time do all that is necessary to ensure that these rights are protected. Cited ***Mr. Paul Okafor & Ors v. Obi Victor Ntoka & Ors (2017) LPELR-42794, Per Ogunwumiju JCA (as he then was) at pages 20-21 paras F-B.*** The Applicant made reference to the Affidavit in support of this fundamental rights application to show how the Respondent intimidated, assaulted and treated her with indignity contrary to her right to freedom of expression and the press as contained in Sections 39 and 46 of the Constitution. For the definition of freedom, the Applicant cited ***Ugwu V. Ararume (2007) ALL FWLR (Pt. 377) 815.*** She urged the Court to hold that every individual ought to be protected with dignity at all times. Referred to the cases of ***Ibrahim Master v. Mohammed Mansur (2014) LPELR-23440(CA) and Odogu v. A- G- F & 6 Ors (1996) 6 NWLR (Pt. 456) 508.***

On whether the Police have powers to stop or restrict the fundamental rights of Nigerians to freedom of expression and assembly, the Applicant argued that the Police have no powers whatsoever to stop or restrict the exercise of these rights as long as it was peacefully exercised. Referred ***to Inspector General of Police v. ANPP (2007) LPELR-8932 (CA)***. The Applicant made reference to paragraphs 7, 8, 9, 10, 11 and 12 of the supporting Affidavit to show how she was using her phone for recording and posting peaceful protest on her twitter handle when the agents of the Respondent flogged, tortured her and destroyed her phone.

The Applicant finally urged the Court to hold that the destruction of her phone used in capturing and posting the events during the End SARS protest is unjustifiable, unlawful and unconstitutional.

On issue 2, the Applicant submitted that based on the facts deposed to in the Affidavit, the Respondent have intimidated, harassed and assaulted her and that their action is a Constitutional violation which amounts to an infringement of her rights and therefore entitled her to all the reliefs sought.

She finally urged the Court to grant all the reliefs sought whilst relying on the Court of Appeal case of ***Zenith Bank v. Ekereuwam (2012) 4 NWLR (Pt. 1290) 207 at 238 paras B-C (CA)*** on exemplary damages.

I consider it apt to start by stating that it is an elementary but fundamental principle of our adversarial system that an applicant is bound by the prayers in his application. See **A.C.B. LTD. V. A.G. NORTHERN NIGERIA (1969) N.M.L.R. 231.**

Let me quickly point out that the primary relief sought by the applicant in this case is a declaratory order. The applicant has alleged the breach of her right to freedom of expression and press guaranteed under Section 39 of the 1999 Constitution (as amended).

It is noteworthy that the originating summons of the Applicant in this case seems founded on enforcement of fundamental rights and requiring only statutory and constitutional interpretation. Admittedly, the applicant has

raised a constitutional question which in my humble opinion, touches on alleged harassment, intimidation, threatening, physical assault and damage to her mobile phone suffered at the hands of officers of the Respondent on 11/10/2020 during the End SARS protest in Abuja.

Relief 2 however being for compensatory damages of 5 Million Naira appears to be the consequential claim.

The declaratory relief that the applicant seeks is by its very nature placing the onus of proof on the Applicant. It is the law that declaratory reliefs are only granted when credible evidence has been led by the person seeking the declaratory relief. The person seeking the declaratory relief must plead and prove the claim for declaratory relief without relying on the evidence called by the defendant. A declaratory relief will not be granted even on admission by the defendant. See ***ANYARU V. MANDILAS LTD (2007)4 SCNJ 288 AND MATANMI & ORS V. DADA & ANOR (2013) LPELR 19929". –PER J. S. ABIRIYI, J.C.A***

In **GOVERNMENT OF GONGOLA STATE V. TUKUR (1989) 4 N.W.L.R. (PT. 117) 592** the Court held that a declaratory Order merely declares a legal situation or rights or relationship. It is complete in itself, the declaration being the relief. It does not order anyone to do anything.

Bearing those principles in mind and having regard to all the circumstances of this case, I now turn to the facts.

Crucially, Originating Summons is to be used when it is required by a statute, where a dispute which is concerned

with matters of law and where there is unlikely to be any substantial dispute of facts. Hence, Originating Summons would be ideal if there is no likelihood for dispute of facts. Suffice it to state that this presupposes that an applicant would amply furnish facts and evidence to leave no room for doubt as to the circumstances of her case.

Comparatively speaking, the affidavit depositions in this case appear to have more flesh than those of the sister case. By that I refer to ***Suit No. FHC/ABJ/CS/1520/2020: Uloko Rachael Ochanya V. I.G.P.***

In the 16- Paragraph Affidavit of Counsel for the Applicant, deposed in support of the Originating Summons, Paragraphs 9 to 13 of the Affidavit of Charles bear some relevant facts. Those relevant paragraphs are recaptured as follows:

9) **Ever since the Applicant joined the protest, she had been expressing herself by broadcasting posts on her Twitter handle on the progress and peaceful state of the protest.**

10) **On the 11th day of October 2020, the Applicant again joined the peaceful protest as usual and exercised her fundamental rights of freedom of expression and the press as guaranteed by the constitution of the Federal Republic of Nigeria, 1999 (as amended)**

11) **On the same 11th day of October 2020, while the peaceful protest was going on and the Applicant was recording the peaceful protest in a bid to post same on her social media handle as**

report of the event, some officers of the Respondent (Policemen) disrupted the protest.

12) The Applicant made efforts to run away with her sister, friends and brothers. Unfortunately, they were ambushed by the police. While a Police officer started (sic) assaulting the applicant's sister, the applicant took out my (sic) phone to record the assault as a matter of evidence, the officer spotted the Applicant, pounced on her, collected the phone from her, and smashed a stick on the phone until the phone got totally destroyed. Pleaded and marked "Exhibit 2" are the pictures of injury and the Applicant's damaged phone.

13) The Applicant's Samsung phone is valued at N350, 000 (Three Hundred and Fifty Thousand Naira) and she incurred expenses treating my (sic) wounds at the hospital.

As I have stated, the Applicant has given an appreciable factual matrix. However, it fails to add-up to any tangible evidence that could substantiate the claim, given its nature.

With regards to Prayer 1, clearly, the power of a court of record to make a declaration where it is only a question of defining rights of two parties is almost unlimited. This court retains the power to declare contested legal rights, subsisting or future, of the parties represented in the litigation before it. See ***OBI v. N.E.C. (2007) 11 NWLR (PT. 1046) 560 (P. 36, PARAS. F-H)***. It is acknowledged however that human rights litigation can be instituted on behalf of another

person. See ***Paragraph 3 (e) of the Preamble to the Fundamental Rights Enforcement Procedure Rules, 2009.***

The Supreme Court stated in the case of ***DUMEZ NIG. LTD. V NWAKHOBA (2008) 18 NWLR (1119) 361 @ 376 A – E,*** thus: "The burden of proof on the applicant in establishing declaratory reliefs to the satisfaction of the court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the defendant where the applicant fails to establish his entitlement to the declarations by his own evidence. In the present case, it relatively goes to mean that the reliefs sought by the applicant cannot be made on admission or in default of pleading by the Respondent. See ***VINCENT I. BELLO V MAGNUS EWEKA (1981) 1 SC 101; MOTUNWASE V SORUNGBE (1988) 5 NWLR (1992) 90 AT 102; OGOLO V OGOLO (2006) ALL FWLR (313) 1 @ 13 – 14; (2006) 5 NWLR (972) 163 @ 184 D – E.***

For the abundance of caution, it is always good to place enough evidence for the court to evaluate even when it amounts to surplusage of proof. This court would have no qualms granting declaratory reliefs if only the court was satisfied by evidence. As it stands, I am not satisfied as to when, where, by whom and how the circumstances of the applicant's case came about. Exhibit 1 being printouts of some of the applicant's posts on twitter are vague, if not at large. Exhibit 2 being the printout image of a damaged mobile phone and the applicant's bruises is also not good evidence of what it portends. There is no indication as to the time when those images were taken; it could have been at another time unrelated to the period of the event alleged. It

cannot therefore be safely placed within the time frame alleged. Then again, there is nothing pointedly tying the applicant to that phone. I suppose that a purchase receipt could have sufficed.

Moving on, it would seem that the same challenges are shared in common with the images of the bruises. The applicant pleaded the picture to show the bruises and injury she allegedly sustained following assault by the Respondent's officers. However, by itself, the image does nothing to proof what it is supposed to. There is no indication as to when that image was taken. To put it bluntly, the image has failed to prove what is in the place of a medical report to prove. This court cannot rely on speculative evidence.

The law is settled that the applicant must satisfy the court by cogent, credible and convincing evidence, that she is entitled to the declaratory relief as sought. So, as the applicant by her own evidence has failed to prove her claim for declaration, her claim must fail. *See* ***AYANRU V. MANDILAS LTD, (2007) 10 NWLR (PT. 1043) 462; NDAYAKO V. DANTORO (2004) 13 NWLR (PT. 889) 187***. And I so hold.

In consequence, the Applicant's Suit is struck out.

Hon. Justice J. T. TSOHO
CHIEF JUDGE.

Parties absent.

Clifford Kalu Esq. for the Applicant.

IN THE HIGH COURT OF JUSTICE OGUN STATE OF NIGERIA
IN THE ABEOKUTA JUDICIAL DIVISION
HOLDEN AT ABEOKUTA
BEFORE THE HONOURABLE JUSTICE O. A. ONAFOWOKAN - JUDGE
ON THURSDAY THE 28TH DAY OF JANUARY, 2021

BETWEEN: SUIT NO: AB/207/2020

INCORPORATED TRUSTEES OF DIGITAL RIGHTS AND LAWS INITIATIVE - APPLICANT
(For and on behalf of Mr. Leste Aihevba)

AND

HABEEB OLASUNKANMI RASAKI - RESPONDENT

JUDGMENT

The applicant by an originating summons dated 8/6/20 and filed on 17/6/20, claims for:

a. A declaration that by virtue of article 1.1(a) of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is included under right to privacy guaranteed by Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

b. A declaration that the respondent's processing (copying, storage and transmission by disclosure) of Mr. Leste Aihevba's private WhatsApp messages without any legal basis, violated and is likely to further violate Mr. Leste

Aihevba's right to private and family life as guaranteed under article 2.2 of the NDPR and Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(c) Perpetual injunction restraining the respondent and anyone acting through him from further processing (collection, recording, organization, structuring, storage, adoption or alteration, retrieval, consultation, use, disclosure by transmission, dissemination) of Mr. Leste Aihevba's WhatsApp messages in any form.

For the reliefs, the claimants raised the following questions for determination -

1. Whether or not by the interpretation and construction of paragraph 3(e)(v) of the Preamble to the Fundamental Rights Enforcement Procedure Rules and Section 46 of the Constitution 1999 (as amended) and article 4.8 of the NDPR 2019 the applicant has locus standi to commence this action for and on behalf of Mr. Leste Aihevba.

2. Whether or not by the construction of article 1.1(a) of the Nigeria Data Protection Regulation 2019 and section 37 of

the Constitution (as amended) data protection is guaranteed under right to private and family life.

3. Whether or not the applicant is entitled to the reliefs sought.

The applicant pursuant to Order II Rule 3 of the FREPR filed a statement of the name/ description of the applicant, the reliefs sought and the grounds upon which the reliefs are sought. The applicant also filed an affidavit of 13 paragraphs with 4 exhibits deposed to by one Ayo Rotifa and a written address settled by M. O. Sanni Esq.

The respondent filed a counter-affidavit of 11 paragraphs with six exhibits marked HB1 - HB6 and a written address settled by O. V. Iweze Esq.

At the hearing of the summons, the applicant's counsel, Babalola Esq placed reliance on the statement, the affidavit in support of the summons and adopted the two written addresses filed on behalf of the applicant as his arguments and urged the court to grant the reliefs sought. The respondent's counsel, Iweze Esq also placed reliance on the respondent's counter-affidavit and adopted his written address in urging the court to refuse the application.

I have considered the reliefs sought on the summons, the questions for determination and the affidavits for and against the reliefs sought. Though the claimant on the face of the summons raised two questions already reproduced above, for determination and

which issues, his counsel made copious submissions on, the respondent's counsel, in his address put forward another issue i.e. "whether the applicant is entitled to the reliefs sought?"

Subsumed in this issue, as deducible from respondent counsel's submission are two salient and fundamental sub-issues that strike at the substratum of the originating summons, questioning its competence. The sub-issues are (a) that relevant paragraphs of the affidavit in support of the summons contravene the provision of Section 115(4) of the Evidence Act; and (b) that the main relief being claimed in the summons is not cognizable under the Fundamental Rights Enforcement Procedure Rules. Truth be told, if these issues, or any one of them is resolved against the applicant, it will without more ado, determine the summons in limine. I will consider the second sub-issue first.

On the 2nd sub-issue, the respondent's counsel Mr. Iweze has argued that the principal relief being claimed in the summons is not for the enforcement of fundamental right. He referred to Order II Rule 1 of the Fundamental Right Enforcement Rules and the cases of Mbadike v. Lagos International Trade Fair Complex Management Board (2017) LPELR - 4468 (CA) and Jack v. University of Agriculture Markurdi (2004) 5 NWLR (Pt. 865) 208 among others and submitted that the applicant is not seeking for the enforcement of any fundamental right rather he wants the court to make a finding that data protection is included under the right to privacy guaranteed in Section 37 of the Constitution. Counsel further cited WAEC v. Akinkunmi (2008) LPELR - 4173 (SC) and submitted that this action is hinged on the enforcement of Nigeria Data Protection

Regulation (NDPR) and not fundamental rights as provided under Section 37 of the Constitution. He argued that relief 1 is bound to fail and that if relief I fails, relief 2 must also fail. Surprisingly the applicant's counsel in his reply on point of law did not offer any jot of submission of the point.

The originating summons herein was presented as a fundamental right enforcement process pursuant to Order II Rules 1, 2 and 3 of the Fundamental Right (Enforcement Procedure) Rules supposedly to enforce the fundamental right to privacy of one Leste Alhevba as guaranteed under section 37 of the 1999 Constitution (as amended).

The Fundamental Rights Enforcement Rules may be activated by any person who alleges that any of the Fundamental Rights provided for in the constitution or African Charter of Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being or is likely to be infringed, such a person may apply to the court in the State where the infringement occurs or is likely to occur; for redress. In effect by section 46(1) of the 1999 Constitution, a person whose fundamental right is breached, being breached or about to be breached may apply to a High Court in that State for redress; and as rightly submitted by the respondent's counsel, it is settled in a plethora of cases that when an application is brought under the Fundamental Rights (Enforcement Procedure) Rules, a condition precedent to the exercise of the jurisdiction of the court is that the enforcement of fundamental rights or the securing of the enforcement of same must be the main claim as well as the ancillary claim. Where the main claim or principal claim is not the enforcement or securing the

enforcement of Fundamental right, the jurisdiction of the court cannot be properly exercised and the action will be incompetent. See Gafar v. Government of Kwara State (2007) All FWLR (Pt. 360) 1415 @ 1436; Amale v. Sokoto Local Government (2012) 1 SC (Pt. IV) 43; Sea Trucks Nig. Ltd. v. Anigboro (2001) 2 SCM 168. In F.R.N. v. Ifegwu (2003) 8 SCM 111, it was held that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief is for the enforcement of a fundamental right and not, from the nature of the claim to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim of a fundamental right.

Against that background, I have closely examined the two reliefs (reproduced above) being claimed and I cannot agree more with the respondent's counsel that the principal relief is not for the enforcement of fundamental right, rather, as exemplified and amplified by the two questions posed by the applicant for determination, it is about the interpretation and construction of article 1.1(a) and 4.8 of the Nigeria Data Protection Regulation (NDPR) 2019 and the locus of the applicant to enforce the supposed right to privacy of an individual. As a consequence, the claim is not cognizable under the Fundamental Rights (Enforcement Procedure) Rule 2009 and the court has no jurisdiction to entertain it. I so hold. The action is therefore struck out.

O. A. ONAFOWOKAN

JUDGE

28/01/2021

Parties Absent

O. V. Iweze for Respondent

Applicant is not represented.

IN THE COURT OF APPEAL
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON FRIDAY, THE 24TH DAY OF SEPTEMBER, 2021
BEFORE THEIR LORDSHIPS:

UGOCHUKWU ANTHONY OGAKWU	-	**JUSTICE, COURT OF APPEAL**
FOLASHADE AYODEJI OJO	-	**JUSTICE, COURT OF APPEAL**
ABBA BELLO MOHAMMED	-	**JUSTICE, COURT OF APPEAL**

APPEAL NO. CA/IB/291/2020

CERTIFIED TRUE COPY
REGISTRAR
COURT OF APPEAL
OLUBIYI OMOSUL
DATE: 30-9-21

BETWEEN

1. INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE (Suing for and on behalf of other Data Subjects in Nigeria)
2. MR. ADEYEMI ATAYERO
3. MR. OLASUNKANMI BELLO

APPELLANTS

AND

NATIONAL IDENTITY MANAGEMENT COMMISSION - RESPONDENT

JUDGMENT
(DELIVERED BY ABBA BELLO MOHAMMED, JCA)

This appeal is against the judgment of the High Court of Ogun State (hereinafter referred to as "the trial court") delivered in Suit No. AB/83/2020 on the 15th of July, 2020 by Honourable Justice A. A. Akinyemi, wherein the learned trial judge struck out the Applicant's suit for want of jurisdiction.

As recast by the trial court at page 86 of the record, the brief facts of the case as presented by the Appellant before the trial court was that the 2nd Appellant (2nd Claimant) who had registered with the Respondent (Defendant) for the issuance of the National Identity Card was given a National Identification Number Slip which bore a month of birth different from his actual month of birth. The 2nd Appellant then applied to the Respondent for the rectification/correction of his date of birth. To have this done, the Respondent requested the 2nd Appellant to pay a fee of N15,000.00 (Fifteen Thousand Naira only), in accordance with its laid down official policy and procedure. The 2nd Claimant then objected to this request for payment, claiming that it violated his fundamental right to private and family life as guaranteed by Section 37 of the Constitution of the Federal Republic of Nigeria, 1999.

Thus, by an Originating Summons which was supported by a statement, an affidavit and a written address all dated 12th February, 2020 (contained in pages 1 – 15 of the Record of Appeal), the Appellants, as Applicants sought from the trial court the determination of the following questions:

1. Whether or not by the construction of Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Respondent's act of demanding for payment for rectification/correction of personal data is likely to interfere with the Applicant's right to private and family life?

2. Whether or not by the provisions of Article 3:1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR), the Applicants can request

for rectification/correction of personal data from the Respondent free of charge.

Based on the determination of the above questions, the Appellants (Applicants) then sought for the following reliefs:

1. A declaration that demand for payment for rectification/correction of personal data of the Applicants is likely to violate the Applicant's fundamental rights to private and family life guaranteed under Section 37 of Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulations, 2019 (NDPR).

2. A declaration that rectification/correction of personal data of the Applicants by the Respondent ought to be done without payment by virtue of Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 3.1(1)(7)(h) of the National Data Protection Regulations, 2019 (NDPR).

3. An order mandating the Respondent to rectify/correct personal data of the Applicants pursuant to section 37 of Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 3.1(1)(7)(h) of the National Data Protection Regulations, 2019 (NDPR) free of charge.

4. An order or perpetual injunction restraining the Respondent from further demanding payment for rectification/correction of personal data of the Applicants and/or all other data subjects pursuant to

section 37 of Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 3.1(1)(7)(h) of the National Data Protection Regulations, 2019 (NDPR).

In response to the Appellants (Claimants) suit, the Respondent filed a Memorandum of Conditional Appearance, a Notice of Preliminary Objection challenging the trial court's jurisdiction, as well as a Counter Affidavit to the Originating Summons, all dated 16th March, 2020 and filed on 23rd March, 2020. The Appellants then countered with a written address in opposition to the Respondent's preliminary objection and a reply on points of law all dated 27th May, 2020 and filed on 29th May, 2020. Having joined issued on the preliminary objection and the originating summons, the trial court heard the parties and in its final judgment at pages 82 – 94 of the Record of Appeal, the court upheld the preliminary objection of the Respondent, declined jurisdiction and struck out the Originating Summons.

Dissatisfied with the judgment of the trial court, the Appellants appealed to this Court on three grounds as contained in the Notice of Appeal dated 16th July, 2020, which is at pages 96 – 101 of the Record of Appeal.

At the hearing of the appeal on the 12th of July, 2021, the Appellants were represented by Solomon Okadara Esq, but the Respondent who was served with hard copy of hearing notice through its counsel, was absent and unrepresented. Hence, the Appellant's Counsel adopted the Appellant's Brief of Argument and Reply Brief dated 20th September, 2020 and 23rd November, 2020 and filed on 26th September, 2020 and 2nd December, 2020, respectively which were all settled by Olumide Babalola Esq. The Respondent's Brief of Argument dated and filed on 3rd

November, 2020, which was settled by Adedotun Ishola Osobu Esq, was deemed adopted pursuant to Order 19 Rule 9(4) of the Court of Appeal Rules, 2016.

In the Appellants' Brief of Argument the following three issues were distilled for determination:

1. Whether or not the trial court was right when it held that rectification of date of birth has nothing to do with right to private and family life guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). (Ground 1).

2. Whether or not the trial court was right when it held that the Appellants' suit which bordered on data protection did not disclose a cause of action under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and thereby occasioned a miscarriage of justice to the Appellants. (Ground 2).

3. Whether or not the trial court was right when it relied on this Court's decisions in Udo v Robson (2018) LPELR-45183(CA) and Solomon Kporharo V Michael Yedi (2017) LPELR-42418(CA) to hold that a joint application cannot be validly brought under the provisions of Fundamental Rights Enforcement Procedure Rules, 2009. (Ground 3).

In the Respondent's Brief of Argument, on the other hand, the following three issues were formulated for determination:

1. Having regard to the lack of jurisdiction of the lower court to entertain the Appellants' suit, whether the lower court was right in declining jurisdiction to entertain same. (Ground 1).

2. Whether the lower court was right when it held that the Appellants' suit did not disclose a cause of action under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). (Ground 2).

3. Having regard to the position of the law in Udo V Robson (2018) LPELR-45183(CA) and Solomon Kporharo V Michael Yedi (2017) LPELR-42418(CA), whether the lower court was right in holding that a joint application cannot be validly brought under the provisions of the Fundamental Human Rights (Enforcement Procedure) Rules, 2009 (Ground 3).

A look at the issues formulated by the parties shows that, but for the differences in the use of words, the three issues formulated by each of them are substantially the same. The three issues distilled by the Appellant however appear to me to be better couched, so I shall adopt them for the purpose of determining this appeal.

In so doing however, I shall, as done by the Appellant, consider and resolve issues 1 and 2 together, since the two issues are substantially similar.

ISSUES 1 and 2: Whether or not the trial court was right when it held that rectification of date of birth has nothing to do with right to private and family life guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). (Ground 1); and

Whether or not the trial court was right when it held that the Appellants' suit which bordered on data protection did not

disclose a cause of action under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and thereby occasioned a miscarriage of justice to the Appellants. (Ground 2).

Learned Counsel for the Appellants, Olumide Babalola Esq, had referred the Court to the finding of the trial court at page 89 of the Record of Appeal to the effect that the right to privacy guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 means the right to be free from public attention or free from intrusion into one's private space by others, as well as protection of personal information from others. He argued that by that finding, the trial court had agreed with the Appellants that protection of personal information and/or personal data are contemplated under right to privacy guaranteed in Section 37 of the Constitution, but surprisingly the court held that the demand for payment of N15,000.00 (Fifteen Thousand Naira only) for correction of the date of birth of the 2nd Claimant has absolutely nothing to do with his right to privacy.

Learned Counsel further submitted that this finding of the trial court also dovetails into ground two of this appeal, relating to lack of cause of action. On the latitude of right to privacy, learned Counsel cited the decision of this Court in **NWALI v EBSIEC (2014) LPELR-23682(CA),** to the effect that the meaning of "privacy of citizens" is very wide and does not define the specific aspects of privacy of citizen it protects, but must be interpreted liberally to include privacy of citizen's body, life, person, thought, belief, conscience, feelings, views, decisions (including his plans and choices), desires, health, relationships, character, material possessions, family life, activities, et cetera.

As for the requirement of data protection, learned Counsel relied on Halbury's Laws of England, Vol. 8(1), Fourth Edition (Re-issue), 2003 at page 418, paragraph 503. He also cited the following foreign decisions of the European Court of Human Rights cited in Casebook on Data Protection by Olumide Babalola (ISBN:978620255355-1) published in June, 2020: **ANNE MARIE COUDERC & HACHETTE FILIPACCHI ASSOCIES v FRANCE (ECTHR) at para 83; M.L. and W.W. v GERMANY (ECTHR), at para. 87; PECK v UNITED KINGDOM (ECTHR), at para. 78; MR. JEAN-MICHEL AYCAGUER v FRANCE (ECTHR); and M.K. v FRANCE (No. 19522/09),** at para. 35, all relating to the fundamental importance of personal data protection.

On the right to the rectification of personal data, learned Counsel referred the Court to the Nigeria Data Protection Regulations (NDPR, 2019) made by the National Information Technology Development Agency (NITDA) in January, 2019. He cited its preamble, and Articles 1:1, 2:9 and 3:1(8) which emphasized the need to interprete the privacy right of a data subject for the purpose of advancing and not restricting his fundamental rights and the Nigerian laws, as well as the right of data subjects to obtain rectification of inaccurate personal data concerning them. Counsel cited the following foreign cases relating to data rectification which were contained in Casebook on Data Protection by Olumide Babalola (ISBN:978620255355-1) published in June, 2020: **MS. ANITA GODELLI v ITALY (2012) ECTHR, at page 59; SINAN ISIK v TURKEY (ECTHR), at page 109; PETER NOWAK v DATA PROTECTION COMMISSIONER, Court of Justice of European Union (CJEU), at page 481; GOOGLE SPAIN SL, GOOGLE INC. v AGENCIA ESPANOLA DE PROTECCION DE DATOS (AEPD), at page 496; and MR. TORSTEN LEANDER v SWEDEN, the European Court, at page 529.** He contended that from

the tenor of these cases, the right to rectification of data is a data protection right and this is subsumed in the right to privacy guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria.

Counsel submitted that it is curious that the trial court failed to consider the provisions of the NDPR, 2019 to ascertain whether the right to rectification falls under Section 37 of the Constitution, but instead held at page 91 of the Record of Appeal that the NDPR, 2019 cannot confer jurisdiction on a court which the Constitution has not given it.

Learned Counsel further submitted that since the trial court had agreed that section 37 embodies protection of personal information/data, then the court cannot be heard to hold that the NDPR which was made in furtherance of right to privacy guaranteed under Section 37 of the Constitution cannot confer jurisdiction on the High Court, which has concurrent jurisdiction to hear fundamental rights matters. He relied on **ZAKARI v IGP (2000) LPELR-6780(CA); AGBASO v IWUNZE (2014) LPELR-24108(CA) and OSUNDE v BABA (2014) LPELR-23217(CA).**

Learned Counsel submitted that that the trial court was wrong when it held at page 93 line 25 of the Record that the demand for payment of N15,000 for correction of the date of birth of the 2nd Claimant has absolutely nothing to do with privacy. He argued that the correction of date of birth (personal data) has everything to do with right to privacy. Relying on the decision of the European Court of Human Rights in **B.B. v FRANCE at page 537** of Casebook on Data Protection by Olumide Babalola (ISBN:978620255355-1) published in June, 2020, he posited that since rectification of personal data is a right, the Respondent

cannot validly ask for payment before such a right can be exercised and enjoyed. He cited **ABBA AJI v BUKAR ABBA (2014) 24362(CA),** to the effect that a right is something that is due to a person by just claim, legal guarantee or moral principle.

Counsel urged the Court to resolve the two issues in favour of the Appellants and hold that the trial court was wrong to have held that rectification of date of birth had nothing to do with right to privacy, having initially held that right to privacy embodies personal information/personal data.

In his counter submission on the two issues, learned Counsel for the Respondent, Adedotun Ishola-Osobu Esq, submitted that the Appellant's case before the trial court was not a fundamental right action, as there are no facts deposed in the supporting affidavit to suggest a breach or likely breach of the Appellant's fundamental rights as enshrined in Section 37 of the 1999 Constitution to warrant commencing a fundamental rights action. He argued that the complaint of the Appellants is rather against the administrative decision or procedure of the Respondent. He contended that by Section 251(1)(a), (q) & (r) of the CFRN, 1999 it is the Federal High Court and not the State High Court that has jurisdiction to entertain the suit before the lower court.

Learned Counsel argued that the statutory fee for modification os the 2nd Appellant's date of birth which is paid to the Federal Government through Remita is a matter within the ambit of Section 251(1)(a) which bothers on the revenue of the Federal Government. He further argued that the case of the Appellant in which he seeks the interpretation of Section 37 of CFRN, 1999 as it affects the Respondent is covered by Section 251(1)(q) of CFRN, 1999, while the executive or

statutory fees. He submitted that Article 3.1(1)(7) of the NDPR, 2019 relied upon by the Appellants does not state that modification of the 2nd Appellant's date of birth should not be done by the Respondent without payment of prescribed fees and as such none of those provisions was breached by the Respondent. He added that there is nothing in those provisions which suggest that the 2nd Appellant has the right to have his date of bi.th modified without payment of the prescribed fees. He relied on **MARWA & ORS v NYAKO & ORS. (2012) LPELR-7837(SC); and AC & ANOR v INEC (2007) LPELR-66(SC).**

It was also the contention of learned Counsel for the Respondent that the judicial authorities of **ZAKARI v IGP (2000) LPELR-6780(CA); AGBASO v IWUNZE (2014) LPELR-24108(CA); and OSUNDE v BABA (2014) LPELR-23217(CA),** relied upon by the Appellants to approach the court in cases of threatened or actual breach of fundamental rights can only be applicable in elation to rights guaranteed by law and not imaginary rights. He further argued that the NDPR, 2019 is a regulation, while the National Identity Management Commission Act, 2007 (NIMC Act) is an Act of the National Assembly which is higher in the hierarchy of laws. He submitted that section 31(d)(i) & (ii) of the NIMC Act, 2007 is superior to that of Article 3.1(1)(7)(h) of the NDPR, 2019, and as such the latter must be read subject to the former. He relied on **KRAUS THOMPSON ORGANISATION v N.I.P.S.S. (2004) LPELR-1714(SC), at page 18; and ARDO v NYAKO & ORS (2014) LPELR-22878(SC), at page 47.** He urged the Court to apply the provision of Section 31(d)(i) & (ii) of the NIMC Act to the facts of this case, such that the provision of Article 3.1(1)(7)(h) of NDPR, 2019 does not derogate from its effect.

Learned Counsel for the Respondent further argued that the reliance by the Appellants on Article 3.1(8) of the NDPR, 2019 is not relevant to the instant appeal as it deals with transfer of personal data to a foreign country. Similarly he posited that the reliance by the Appellants on the cases of **ZAKARI v IGP (2000) LPELR-6780(CA); AGBASO v IWUNZE (2014) LPELR-24108(CA); and OSUNDE v BABA (2014) LPELR-23217(CA)**, in contending that the lower court erred when it held that the NDPR cannot confer jurisdiction on it, is misplaced. He added that all the foreign decisions cited by the Appellants are at best of persuasive effect. He relied on **INAKOJU v ADELEKE (2007) LPELR-1510(SC), per Tobi, JSC at page 61; ALLI v OKULAJA (1972) 2 All NLR 351; DADA v THE STATE (1977) 2 NLR 135; ELIOCHIN (NIG) LTD v MBADIWE (1986) 1 NWLR (Pt. 14) 47; and OLADIRAN v THE STATE (1986) 1 NWLR (Pt. 14) 75,** and submitted that the cases do not advance the Appellants' case as there is nowhere it was stated that a data subject is entitled to modification of data free of charge. He urged the Court to resolve the two issues in favour of the respondent.

RESOLUTION OF ISSUES 1 AND 2:

I have carefully considered the arguments of the parties over this issue. This appeal is essentially against the trial court's decision declining jurisdiction to entertain the Appellants' suit on the ground that the suit does not reveal a cause of action under the fundamental rights procedure but a suit that challenges the executive/administrative action of the Respondent, a Federal Government Agency, which falls under the exclusive jurisdiction of the Federal High Court.

It is trite law that in order for a court to determine whether it has jurisdiction to entertain a suit, the Court must have recourse to the Plaintiff's originating process, in this case the Applicants' Originating Summons. See:

It is also settled law that for an action to be properly brought under the Fundamental Rights (Enforcement Procedure) Rules, 2009, (as was done by the Applicants at the trial court), it must relate to infringement of any of the fundamental rights guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See: **UNIVERSITY OF ILORIN & ORS v IDOWU OLUWADARE (2006) 14 NWLR (Pt. 100) 751; ACHEBE v NWOSU (2003) 7 NWLR (Pt. 818) 103; ADEYANJU v WAEC (2002) 13 NWLR (Pt. 785) 479; and DIRECTOR, SSS v AGBAKOBA (1999) 3 NWLR (Pt. 595) 314.** In other words, for an action to be cognizable under the fundamental rights procedure, the infringement of any of the rights under Chapter IV of CFRN, 1999 must be the primary wrong forming the basis of the claim.

In the instant appeal, the central contention of the Appellants in challenging the above holding of the trial court is that the right to rectification of data is a data protection right and this is subsumed in the right to privacy guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria. Learned Counsel for the Appellants had hinged his contention on the provisions of the National Data Protection Regulations, 2019 (NDPR), particularly Article 3.1(1),(7),(8) of the NDPR, 2019, which was made pursuant to the right to privacy guaranteed under Section 37 of the CFRN, 1999. He submitted that in declining jurisdiction, the trial court had failed to consider the provision of the said Regulations and held at page 91 that the Regulations cannot confer jurisdiction on the trial court. He relied on

the several foreign decisions of the European Court of Human Rights and the Court of Justice of the European Union.

In the counter argument of the Respondent however, it was contended that the reliance on Article 3.1(8) of the NDPR, 2019 by the Appellants was misconceived as it relates to transfer of personal data to a foreign country. He submitted that Article 3.1(1),(7)(h) of the NDPR, 2019 cannot override Section 31(d)(i) and (ii) of the establishment Act of the Respondent, which is a specific legislation on modification of personal data maintained by the Respondent. Counsel argued that the several persuasive foreign decisions relied upon by the Appellants do not pronounce that a data subject shall be entitled to modification of data free of charge.

In declining jurisdiction to entertain the Appellants' Originating Summons, the trial court had, at pages 89 – 90 of the Record of Appeal, considered the decisions of this Court in **FRN v DANIEL (2011) LPELR-4152(CA) and NWALI v EBSIEC (2014) LPELR-23614(CA)**, on which the Appellant relied, and held as follows:

> These two decided cases clearly explain the scope and ramifications of the right guaranteed under section 37 of the Constitution. The kernel of both the provision of section 37 of the Constitution and these illuminating decisions is, to my mind, that privacy of a citizen of Nigeria shall not be violated. From these decisions, privacy to my mind can be said to mean the right to be free from public attention or the right not to have others intrude into one's private space uninvited or without one's approval. It means to be able to stay away or apart from others without observation or intrusion. It also includes the protection of personal information from others. This right

to privacy is not limited to his home but extends to anything that is private and personal to him including communication and personal data. From the facts of this case, there is no evidence that the defendant or its staff or agents intruded or attempted to intrude into the privacy or personal territories of the Claimants or obtain their data without their consent. It would have been different if the Defendant obtained and retained the Claimants' data without their consent. See: **IBIRONKE v MTN (2019) LPELR-4783(CA).** It would also be an invasion of the Claimants' privacy if the defendant gave unauthorized access to the Claimants' data to third parties. See: **EMERGING MARKETS v ENEYE (2018) LPELR-46193(CA).** To the contrary, the facts show that the defendant accorded recognition to and allowed an exercise of the 2nd and 3rd Claimants' rights, by granting them registration as Nigerian citizens, entitled to be registered for identification as Nigerians. Also, from the facts presented before this court, the demand for payment of a fee was not a condition precedent for registration, but for something that came after registration, as administrative fee for correction of the error in the data supplied by the 2nd Claimant, for his registration. As I have earlier noted, the claimants have not asserted that the error in the 2nd Claimant's date of birth arose as a result of the Defendant's default. I am unable to fathom how this requirement constitutes an infraction to the Claimant's right to privacy under Section 37 of the Constitution. This suit is clearly a challenge of the power of the Defendant to charge a fee for the rectification or correction of the error contained in the 1st Claimant's birth date and not a challenge of a denial of his right to be registered for identification as a Nigerian citizen... The decision of the Defendant, a

> Federal Government Agency, to charge a fee for its services is clearly an executive/administrative one, in my humble view. The courts have held that suits challenging executive and administrative decisions of Federal Government Agencies fall within the exclusive jurisdiction of the Federal High Court.
>
> (underline mine for later emphasis)

The central contention of the Appellant's in challenging the above holding of the trial court declining jurisdiction, is that the right to rectification of data is a data protection right and this is subsumed in the right to privacy guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria.

Learned Counsel had hinged his argument on the provisions of the National Data Protection Regulations, 2019 citing particularly Article 3.1(1),(7),(8) of the NDPR, 2019, which was made pursuant to the right to privacy guaranteed under Section 37 of the CFRN, 1999. He submitted that the Court had in declining jurisdiction, the trial court failed to consider the provision of the said Regulations. He cited the several foreign decisions of the European

In the counter argument of the Respondent however, it was contended that the reliance on Article 3.1(8) of the NDPR, 2019 by the Appellants was misconceived as it relates to transfer of personal data to a foreign country. He submitted that Article 3.1(1),(7)(h) of the NDPR, 2019 cannot override Section 31(d)(i) and (ii) of the establishment Act of the Respondent, which is a specific legislation on modification of personal data maintained by the Respondent.

I have carefully considered submissions of the parties. From the two questions sought for determination in the Appellants' Originating Summons, it seems to me that the Appellants have contended that the imposition of fees by the Respondent for the rectification of personal data can constitute an infringement fundamental right to privacy under Section 37 of CFRN by relying on the provisions of the NDPR, 2019, especially its preamble and Articles 3.1(8) and 3.1(1),(7)(h). The Respondent has however pointed to Section 31(1)(d)(i) and (ii) of its establishment Act to contend that the provisions of the NDPR, 2019 cannot override the powers of the Respondent under the specific provision of its establishment Act.

Section 37 of CFRN, 1999, Section 37 of the CFRN, 1999 which guarantees the fundamental right to privacy provides as follows:

> The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

In highlighting the absence of a clear scope of the right to "privacy of citizens" as guaranteed under Section 37 of CFRN, 1999, this Court, per Agim, JCA (as he then was, now JSC), had held in the cited case of **NWALI v EBSIEC (2014) LPELR-23682(CA) at pages 27 – 29, para. E,** as follows:

> The meaning of the term "privacy of citizens" is not directly obvious on its face. It is obviously very wide as it does not define the specific aspects of the privacy of citizens it protects. A citizen is ordinarily a human being constitution of his body, his life, his person, thought, conscience, belief, decisions (including his plans and choices), desires, his health, his

relationships, character, possessions, family, etc. So how should the term "privacy of citizens" be understood? Should it be understood to exclude the privacy of some parts of his life? ... This can be seen from its holding that the right includes "privacy in private family life and incidental matters when this aspect is not expressly provided for in that section and that meaning is not patently obvious from the text of that section...The privacy of home, privacy of correspondence, privacy of telephone conversations and privacy of telegraphic communication are clear and particular as to the nature of privacy protected or the area or activity in respect of which a person is entitled to enjoy privacy... It is glaring that the phrase "Privacy of Citizens" is general and is not limited to any aspect of the person or life of a citizen. It is not expressly defined by the Constitution and there is nothing in the Constitution or any other statute from which it's exact meaning or scope can be gleaned.

(underline mine for emphasis)

As observed above by His Lordship Agim, JCA (as he then was), the privacy of the home, correspondence, telephone and telegraphic communications protected by the Section are clearly definable and determinable as to their nature and scope. But the meaning and scope of "privacy of citizens" as guaranteed by the Section has not received clear definition/interpretation in the Constitution. The trial court had, in my view, rightly held above, that the right to "privacy of citizens" as guaranteed under the Section includes the right to protection of personal information and personal data.

It is however pertinent to point out that the scope and limitations of the fundamental rights guaranteed in Chapter IV of CFRN, 1999 are generally better understood from the various statutes, laws, regulations, etc., which further the implementation, and in some instances even provide a limitation, to the exercise and/or enjoyment of such rights, as well as in the interpretation of such statutes, laws and regulations by our courts.

Indeed, no set of laws provide a better understanding of the scope and limitations of fundamental rights more than the laws establishing and mandating public institutions and public bodies. In them, one will invariably find an understanding as to the scope, extent, limitations, and even the pathway or procedure to the implementation and or/realization of those rights. For instance, laws, regulations or rules which provide for the investigation/arrest, prosecution and adjudication of criminal offences provide a better understanding of the scopes and limitations of such fundamental rights as to personal liberty, freedom of movement, fair hearing, etc. In the area of adjudication, the laws establishing the courts and rules relating to civil and criminal procedure all ensure that vent is given to enable the realization of such fundamental rights.

Therefore, to enable to fair determination of this appeal, especially whether the trial court is right in its decision declining jurisdiction, I intend to first examine whether matters of personal data protection generally can fall under the right to privacy guaranteed by Section 37 of the 1999 Constitution before specifically determining whether the Respondent's demand for fees for rectification of personal data can come under the same Section 37 of the 1999 Constitution as

give rise to a cause of action under the fundamental right procedure, thus conferring concurrent jurisdiction upon the trial court.

Although the learned Counsel for the Appellants had placed reliance on several decisions of the European Court of Human Rights and the European Court of Justice, I venture to state that, persuasive as those decisions may be in resolving these issues, the Nigerian situation is in the foremost governed the extant laws applicable in Nigeria.

As it relates to data protection, the Federal Government had recently in January, 2019, introduced, through the National Information Technology Development Agency (NITDA), a regulation relating to data protection, which is the Nigeria Data Protection Regulation, 2019 (NDPR, 2019). It is this extant Regulation that has now made provision relating to personal data rights and protection, to which the Appellants have placed heavy reliance.

As rightly observed in paragraph 26 of the Appellants' Brief of Argument, the Preamble of the NDPR, 2019 indicates that that the NDPR, 2019 was made as a result of concerns and contributions of stakeholders on the issue of privacy and protection of personal data. In Article 1.1(a) of the said Regulations, it is stated that one of the objectives of the NDPR, 2019 is to safeguard the rights of natural persons to data privacy.

It is instructive to observe that the NDPR, 2019 specifically provides in Article 2.9 as follows:

> Notwithstanding anything to the contrary in this Regulation, the privacy right of a Data subject shall be interpreted for the purpose of advancing

and never for the purpose of restricting the safeguards data subject is entitled to under any data protection instrument made in furtherance of fundamental rights and the Nigeria laws.

(underlining mine for emphasis).

Even from the holding of the trial court at pages 89 - 90 of the Record which I have quoted above and the dictum of Agim, JCA (as he then was) in NWALI v EBSIEC (supra), as well as the provisions of Article 2.9 of the NDPR, 2019 which I have quoted above, it is beyond doubt that, even as the scope of "privacy of citizens' as used in Section 37 of CFRN, 1999 remains undefined, such a scope will undoubtedly include the privacy and protection of the personal data of citizens.

On the relationship between the NDPR, 2019 and Section 37 of the CFRN, 1999, it is pertinent for me to state that the CFRN, 1999 makes provisions in Chapter IV guaranteeing the various fundamental rights of the citizens. But as I stated earlier, the nature and scope of those rights and even their limitations, are in most instances furthered by other statutes, regulations or other legal instruments. It is in this instance that the NDPR, 2019 must be construed as providing one of such legal instruments that protects or safeguards the right to "privacy of citizens" as it relates to the protection of their personal information or data, which the trial Court had rightly adjudged at page 89 of the Record to be part of the privacy right guaranteed by Section 37 of the CFRN, 1999.

Apart from the provisions of Article 2.9 of the NDPR, 2019 quoted above, which specifically linked the NDPR, 2019 to the fundamental rights guaranteed in Chapter IV of CFRN, 2019, a further look at the provisions of the NDPR, 2019 tends to reinforce this position. In Article 1.2 relating to the scope of the

Regulation, it is stated in paragraph (c) that "this Regulation shall not operate to deny any Nigerian or any natural person the privacy rights he is entitled to under the law, regulation, policy, contract for the time being in force in Nigeria or in any foreign jurisdiction."

From the foregoing therefore, I have hesitation in holding that personal data protection as provided in the National Data Protection Regulations generally falls under the fundamental right to privacy which is guaranteed by Section 37 of the CFRN, 1999. This was in a way also acknowledged by the trial court when it held that right to privacy guaranteed in Section 37 of CFRN, extends to anything that is private and personal, including personal communication and personal data.

On the specific issue of whether the trial court was right when it held the Appellants' case, which relate to the demand of fees for rectification of date of birth, has nothing to do with right to private and family life guaranteed under Section 37 of the CFRN, 1999, I observe that in holding that demanding the sum of N15,000 from the 2nd Appellant for rectification of the personal data relating to his date of birth has nothing to do with the right to privacy guaranteed under Section 37 of CFRN, 1999, the trial court had held at pages 89 – 90 as follows:

> Also, from the facts presented before this court, the demand for payment of a fee was not a condition precedent for registration, but for something that came after registration, as administrative fee for correction of the error in the data supplied by the 2nd Claimant, for his registration. As I have earlier noted, the claimants have not asserted that the error in the 2nd Claimant's date of birth arose as a result of the Defendant's default. I am unable to fathom how this requirement constitutes an infraction to the

> Claimant's right to privacy under Section 37 of the Constitution. This suit is clearly a challenge of the power of the Defendant to charge a fee for the rectification or correction of the error contained in the 1st Claimant's birth date and not a challenge of a denial of his right to be registered for identification as a Nigerian citizen... The decision of the Defendant, a Federal Government Agency, to charge a fee for its services is clearly an executive/administrative one, in my humble view.

(underline mine for emphasis).

In positing that the Respondent's act of demanding for payment of N15,000.00 for rectification/correction of the 2nd Appellant's personal data constitutes an interference with the 2nd Applicant's right to private and family life, the Appellants have placed heavy reliance on the provisions of Articles 3.1(8) of the Nigeria Data Protection Regulation, 2019 (NDPR, 2019) and argued that the Applicants have the right to request for rectification/correction of personal data from the Respondent free of charge, and as such the demand of fees for rectification of the 2nd Appellant's date of birth gives a rise to a cause of action under Section 37 of CFRN, 1999. The Respondent had however posited that the demand for fees for rectification of data is part of its policy which it is mandated to do under Section 31(1)(d)(i) and (ii) of its establishment Act.

I have gone through Article 3.1(8) of the NDPR, 2019 which is relied upon by the Applicants. As rightly observed by the Respondent, the provision actually relates to transfer of personal data to a foreign country or to an international organization. It is instructive however to state that, going through the

Regulations, I discovered that Article 2.8(b) of the said Regulations provides as follows:

> The right of a data subject to object to the processing of his data shall always be safeguarded. Accordingly, a Data Subject shall have the option to:
>
> ...
>
> (b) be expressly and manifestly offered the mechanism for objection to any form of data processing free of charge.

In addition to that provision however, Article 3.1(3) & (4) of NDPR, 2019 also provides that:

> (3) Except as otherwise provided by any public policy or Regulation, Information provided to the Data Subject and any communication and any actions taken shall be provided free of charge. Where requests from a Data Subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:
>
> a) charge a reasonable fee considering the administrative costs of providing the information or communication or taking the action requested; or
>
> b) write a letter to the Data Subject stating refusal to act on the request and copy The Agency on every such occasion through a dedicated channel which shall be provided for such purpose.

(4) The Controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

(underline mine for emphasis)

From the above provisions of the NDPR, 2019, it is clear that although the above the Regulations provide that data processing and rectification shall generally be free of charge, except for unfounded, excessive and repetitive requests, those provisions of the Regulations have been made subject to any public policy or regulation which may impose fees for the provision of those services.

I have also looked at Section 31(d)(i) & (ii) of the National Identity Management Commission Act (NIMC Act, No. 23 of 2007), to which the Respondent referred in paragraph 5.19 of the Respondent's Brief of Argument. As rightly posited by the Respondent, the Respondent is clearly empowered by the Section of its enabling statute to impose fees. The Section provides:

31. The Commission may make regulations for the effective operation of this Act and the due administration thereof and without prejudice to the generality of the foregoing the Commission may by such regulation:

(d) impose fees (if any) of such amounts as the Commission thinks fit, which may be charged for the issue, reissue or replacement of the Multipurpose Identity Cards including different circumstances and the circumstances in which such fees may be charged, including any one or more of the following:

(i) applications to the Commission for entries to be made in the Database, for the modification of entries or for the issue of Multipurpose Identity Cards;

(ii) the making or modification of entries in the Database.

As rightly observed by the Respondent, not only does the NDPR subject the rectification of personal data free of charge to any other public policy or regulation, the Respondent's establishment Act empowers it to impose fees for the making or modification of entries in the National Identities Database which it is mandated to keep.

The point must be stressed that at the point of determining whether a suit discloses a cause of action under the fundamental rights procedure, the principal complaint must relate to infringement of any of the fundamental rights provided in Chapter IV of the CFRN, 1999. See:

The Respondent in this appeal is the National Identity Management Commission established by the National Identity Management Commission Act, No. 23 of 2007. In Section 5 of the Act, the Respondent is generally mandated to create, manage, maintain and operate the National Identity Database, including the harmonization and integration of existing identification databases in government agencies and integrating them into the National Identity Database; carry out the registration of citizens and non-citizens into the National Identity Database.

As rightly observed by trial court at pages 89 – 91 of the Record of Appeal, the case of the Appellant is not that the Respondent had denied the 2nd and 3rd Appellants registration or that the Respondent or any of its agents granted

unauthorized access to their personal data without their consent. Indeed, in holding that the rectification of date of birth and demanding the sum of N15,000 from the 2nd Appellant for such rectification has nothing to do with the right to privacy guaranteed under Section 37 of CFRN, 1999, the learned trial Judge had, in my view, categorized the Appellants' case correctly when he held at pages 89 – 90 as follows:

> Also, from the facts presented before this court, the demand for payment of a fee was not a condition precedent for registration, but for something that came after registration, as administrative fee for correction of the error in the data supplied by the 2nd Claimant, for his registration. As I have earlier noted, the claimants have not asserted that the error in the 2nd Claimant's date of birth arose as a result of the Defendant's default. I am unable to fathom how this requirement constitutes an infraction to the Claimant's right to privacy under Section 37 of the Constitution. This suit is clearly a challenge of the power of the Defendant to charge a fee for the rectification or correction of the error contained in the 1st Claimant's birth date and not a challenge of a denial of his right to be registered for identification as a Nigerian citizen... The decision of the Defendant, a Federal Government Agency, to charge a fee for its services is clearly an executive/administrative one, in my humble view.
>
> (underline mine for emphasis).

I am in agreement with the above reasoning and conclusion of the trial court. Before that court, the Appellants have in their Originating Summons only tried to masquerade their challenge to the executive/administrative policy of the

> Courts in any common law country are to be accepted in this country as precedents in the like of the Delphic Oracle." See also Uyanne v. Asika (1975) 4 SC 233 and Esan v. Olowa (1974) 3 SC 125."

In the instant case, all the foreign decisions cited by the Appellants cannot provide a substitute to the clear provisions of the National Identity Management Commission Act and the NDPR, 2019, all of which I have analyzed above in relation to the Nigerian position. My consideration of the provisions of the National Identity Management Commission Act, 2007 as well as those of the National Data Protection Regulations has clearly revealed that the charging of fee for rectification of personal data by the National Identity Management Commission cannot constitute a cause of action under the right to privacy guaranteed by Section 37 of the CFRN, 1999 (as amended). As rightly held by the trial court, the Appellants' suit before the trial court is rather clearly a challenge to the Respondent's public policy decision of charging fees for rectification of personal data, which it is expressly empowered to do by its enabling legislation.

As stated earlier, the trite law is that only a suit which relates to infringement of any of the fundamental rights provided under Chapter IV of CFRN, 1999 can be brought under the Fundamental Rights (Enforcement Procedure) Rules, 2009. See: **UNIVERSITY OF ILORIN & ORS v IDOWU OLUWADARE (supra); ACHEBE v NWOSU (supra); ADEYANJU v WAEC (supra); and DIRECTOR, SSS v AGBAKOBA (supra).** The suit of the Appellants before the trial court is principally not one for the enforcement of the fundamental right of the Appellants but a challenge to the Respondent's decision to charge fees for rectification of personal data in the National Identity Database which it is statutorily mandated to manage.

By the express provision of Section 251(1)(r) of the CFRN, 1999, all civil causes and matters relating to any action or proceedings for a declaration or injuction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies fall under the exclusive jurisdiction of the Federal High Court and a State High Court has no jurisdiction to entertain such an action. See: **NEPA v EDEGBENRO (2002) LPELR-1957(SC), per Ogundare, JSC at pages 14 – 15, paras. C – D; OLORUNTOBA-OJU & ORS v DOPAMU & ORS (2008) LPELR-2595(SC), per Muhammad, JSC at pages 30 – 32, paras. F – B; OLUTOLA v UNILORIN (2004) LPELR-2632(SC), per Tobi, JSC at pages 40 – 43, paras. D – C; and OBI v INEC (2007) LPELR-24347(SC), per Aderemi, JSC at pages 39 – 41, paras. E – A.**

It is for all the reasons aforementioned that I hereby resolve the first and second issue against the Appellants and hold that the learned trial judge of the Ogun State High Court was right when he held that the Appellants case as constituted did not disclose a fundamental right cause of action under Section 37 of the CFRN, 1999.

ISSUE 3: Having regard to the position of the law in Udo V Robson (2018) LPELR-45183(CA) and Solomon Kporharo V Michael Yedi (2017) LPELR-42418(CA), whether the lower court was right in holding that a joint application cannot be validly brought under the provisions of the Fundamental Human Rights (Enforcement Procedure) Rules, 2009 (Ground 3).

On this issue, learned Counsel for the Appellants, Olumide Babalola Esq, submitted that the reliance placed by the trial court on the Court of Appeal

decisions in *Udo V Robson* (2018) LPELR-45183(CA) and *Solomon Kporharo V Michael Yedi* (2017) LPELR-42418(CA) to decline jurisdiction was erroneous. He pointed out that this suit was instituted by the Appellants before the trial court pursuant to the Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREP Rules 2009), and in the two cases relied upon by the trial court to decline jurisdiction, the provisions of Section 318(4) of the Constitution of the Federal Republic of Nigeria, 1999 and Section 14 of the Interpretation Act were never considered. He argued that the FREP Rules, 2009 provide for action by group of persons.

Learned Counsel further explained that in *Kpoharor's* case (supra), the suit at the trial court was brought under the FREP Rules 2009, and that this Court had rightly noted in Udo's case (supra) that the FREP Rules, 2009 had liberalized fundamental rights enforcement by conferring locus standi on civil societies to file actions on behalf of victims of rights violations, but instead relied on the decision in *Kporharor's* case. He submitted that since the decision in *Udo v. Robinson* (supra) was based on the 1979 Rules as used in *Kporharor's* case (supra), it is highly distinguishable from the instant case. He relied on the case of **COOPERATIVE AND COMMERCE BANK v ONWUCHEKWA (1999) LPELR-5512(CA).**

Learned Counsel contended that the issue is one of interpretation of the provision of Section 46 of the Constitution with respect to the phrase "any person". He argued that Section 318(4) of the same Constitution provides that the Interpretation Act shall apply for the purpose of interpreting its provisions. He pointed out that Section 14(b) of the Interpretation Act provides that in any enactment the words importing masculine include feminine and words in the

singular include plural and words in the plural include singular. He relied on the case of **UDEH v STATE (1999) LPELR-3292(SC),** and submitted that in its decision, the trial court did not consider Section 14 of the Interpretation Act. He added that the instant case is brought pursuant to Section 37 which provides for privacy of citizens in the plural form and this buttresses the point that this case is distinguishable from the cases relied upon by the trial court. He urged the Court to depart from them, noting that unlike the 1979 Rules, the FREP Rules, 2009 clearly provides for applications to be brought by associations acting in the interest of its members. He cited Paragraph 3(e) of its Preamble and the decisions of this Court in **OLUMIDE BABALOLA v ATTORNEY GENERAL OF THE FEDERATION (2019) LPELR-25610(CA); IBE ORKATER v CHIEF GODWIN EKPO (2014) LPELR-25525(CA); and UZOUKWU & ORS. v EZEONU II & ORS (1991) 6 NWLR (200) 768.** He urged the Court to depart from the decisions in Kporharor and Udo's cases and resolve this issue in favour of the Appellants.

In his counter submission, learned Counsel for the Respondent, submitted that in filing this action at the lower court, the Appellants listed three Applicants contrary to the interpretation of the provision of Order 2 Rule 1 of the FREP Rules, 2009 by the Court of Appeal in **OPARA v S.P.D.C. LTD (2015) 14 NWLR (Pt. 1479) 307 at 350,** which frowns at joint applicants. He added that the use of the word "person" in Order 2 Rule 1 has been interpreted as referring to s single applicant and not multiple applicants.

Referring to the holding of the trial court at page 92 of the Record of Appeal, Counsel argued that the submission of the learned Counsel for the Appellant in urging this Court to depart from the cases of *Kporharor & Anor v. Yedi & Ors*

(supra) and *Udo v. Robson* (supra) should be discountenanced in view of the doctrine of stare decisis. He relied on the cases of **OYEYEMI v IREWOLE LOCAL GOVERNMENT (1993) 1 NWLR (Pt. 270) 462 at 477; and AMAECHI v INEC (2008) LPELR-446(SC).**

Learned Counsel submitted that the case of *Olumide Babalola v. Attorney General of the Federation* (supra) relied upon by the Appellants is inapplicable as it has no bearing on this issue. He argued that the issue of locus standi was never mentioned in ground three of this appeal. Referring to the holding of the trial court at pages 92 – 93 of the Record of Appeal, counsel submitted that Olumide Babalola's case is an authority on locus standi and not an authority for joint applications by more than one applicant. He urged the Court to so hold. He added that the cases of *Kporharor & Anor v. Yedi & Ors.* (supra) and *Udo v. Robson* (supra) being later in time to all the other cases cited by the Appellants ought to be followed. He relied on **MUJAKPERUO & ORS. v AJOBENA & ORS. (2014) LPELR-23264(CA)**, and urged the Court to resolve this issue in favour of the Respondent.

RESOLUTION OF ISSUE 3:

I have considered the submissions of the parties on this issue. The trial court had while considering the second ground of the Respondent's (Defendant's) objection to its jurisdiction to entertain the Appellants' (Claimants') suit, held at pages 92 – 93 of the Record of Appeal as follows:

> The second ground is that claimants cannot bring a common or joint action to enforce their fundamental rights, but that they should have sued individually. Learned Counsel to the Claimants has cited a number of

decided cases by the Court of Appeal to support his argument that this joint claim is competent. However, the cases cited by him, which I have ealier referred to, have been departed from by the Court of Appeal, or are not relevant to the circumstances of this case. The extant position of the law is as stated in the cases of KPORHABOR & ANOR v YEDI & ORS (2017) LPELR-42418(CA), and UDO v ROBSON (2018) LPELR-45183(CA). In the later case, his lordship ADAH, JCA held:

> The contention of the learned counsel for the Respondents that it is proper in law for two or more persons to apply jointly for the enforcement of their fundamental rights cannot be sustained. The decision of this court in KPORHAROR'S case (supra), is the current decision of this Court. By the doctrine of stare decisis I am bound by the earlier decision of this Court. I cannot in any way deviate from it. I hold in the circumstance that it is not proper to join several applicants in one application for the purpose of securing the enforcement of their fundamental rights. The issue is resolved in favour of the Appellant.

The case of OLUMIDE BABALOLA v AGF (2019) LPELR-25610(CA), cited by the Claimants' counsel dealt largely with the issue of locus standi, rather than filing of a joint action by two or more applicants. Locus standi which simply means capacity or standing of a Claimant to institute an action by more than one person. A person may have the standing to sue, yet have his suit disabled by the procedure he has adopted. The standing of the

> Claimants is not the issue in this instance but the manner in which the Claimants have sued. Consequently, the case of BABALOLA v AGF (SUPRA) is distinguishable from this case and therefore, inapplicable. I uphold the submissions of learned counsel to the defendant, Mr. Ishola-Osobu, that this suit is equally incompetent on this ground.

I have gone through the cases of **KPORHAROR'S case (supra);** and **UDO's case (supra)**, which were relied upon by the trial court in the above decision. As rightly contended by the learned Counsel for the Appellants, even though the case of **KPORHAROR (supra)**, was instituted under the Fundamental Rights (Enforcement Procedure) Rules, 2009, the Court considered the provisions of the 1979 Fundamental Rights (Enforcement Procedure) Rules in determining that joint applications cannot be brought in fundamental rights enforcement actions. In so doing, this Court held at pages 8 – 13, paras. F – A, as follows:

> An action under the Fundamental Enforcement Procedure Rules is a peculiar action. It is a kind of action which may be considered as "Sui Generis" i.e. it is a claim in a class of its own though with a closer affinity to a civil action than a criminal action. The available remedy by this procedure is to enforce the Constitutional Rights available to citizens which had been contravened by another person or persons. Fundamental Rights are so basic and inalienable to every man that they have to be enshrined directly in the Constitution. Under the 1999 Constitution of the Federal Republic of Nigeria (as amended) the rights are preserved in Chapter IV i.e. four. See - RAYMOND S. DONGTOE VS CIVIL SERVICE COMMISSION, PLATEAU STATE &

ORS (2001) 4 SCNJ Page 131. The Fundamental Rights (Enforcement Procedure) Rules, 1979 created a special procedure for proceedings under this peculiar category of action. It is only by these procedures that an action can be brought to enforce rights and it is the provisions of the 1979 Rules that guide the conduct of proceedings of all actions to enforce Rights. The right to approach a Court to enforce a Fundamental Right is conferred by Section 46 (1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Section 46 (1) of the 1999 Constitution provides thus:- "Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court for redress." In this appeal under consideration, the application was brought by two separate Applicants (1) Mr. Michael Yedi and (2) Onodje Yedi Nig. Ltd. The words used under Section 46(1) of the Constitution set out above is very clear. The same provision is made in Order 1 Rule 2(1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. The adjective used in both provisions in qualifying who can apply to a Court to enforce a Right is "any" which denotes singular and does not admit pluralities in any form. It is individual rights and not collective rights that is being talked about. In my humble view, any application filed by more than one person to enforce a right under the Fundamental Rights (Enforcement Procedure) Rules is incompetent and liable to be struck out. The above view is supported by the case of - R.T.F.T.C.I.N. VS IKWECHEIGH (2000) 13 NWLR Part 683 at Page 1, where it was held among others that: - "If an individual feels that his Fundamental Rights or Human Rights has been violated, he should take out action personally for the alleged

infraction as rights of one differs in content and degree from the complaint of the other ..... is a wrong joinder of action and incompetent." Also in the case of - OKECHUKWU VS ETUKOKWU (1998) 8 NWLR Part 562 Page 511, it was held amongst others per Niki Tobi, JCA (as he then was) that: - "As I indicated above, the Umunwanne family is the centre of the whole matter. A family as a unit cannot commence an action on infringement or contravention of Fundamental Rights. To be specific, no Nigeria family or any foreign family has the locus to commence action under Chapter IV of the Constitution or by virtue of the 1979 Rules. The provisions of Chapter 4 cover individuals and not a group or collection of individuals. The expression "every individual", "every person", "any person", every citizen" are so clear that a family unit is never anticipated or contemplated." The contention of learned Counsel for the Respondents that it is proper in law for two or more persons to apply jointly for the enforcement of their fundamental rights cannot be sustained. The cases relied upon by Counsel for the Respondents are not relevant because the issue of competence of the action as a result of multiple Applicants did not arise in those cases. The position that more than one Applicant cannot competently bring an application under the Fundamental Right Proceedings is further strengthened by the provision of Order 2 Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 which provides that - "in case several applications are pending against several persons in respect of the same matter or on the same grounds, the applications may be consolidated." The word "may" used is permissive. What it means is that separate applications have to be filed first before they may be consolidated by an order of the

> Court if necessary. And I am of the view that pursuant to Order 2 Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules, filing separate applications is a condition precedent to an order of consolidation."

Interestingly in **UDO's case (supra),** this Court even after noting that the 2009 Fundamental Rights (Enforcement Procedure) Rules have liberalized the enforcement procedure by conferring locus standi on civil societies to file actions on behalf of victims of rights violations still held as follows:

> The way the 2009 Enforcement Procedure Rules introduced liberality must be the focus of the Court to enable us adopt purposive interpretation of the Rules and advance the interest of justice to the victims of fundamental right violations in Nigeria....
>
> In the 2009 Fundamental Rights (Enforcement Procedure) Rules, there is not joinder provision... But in a situation such as in the instant case, the act complained of is the act of arrest and detention without bail and without an arraignment in Court for any known offence I still believe in the circumstance that the Court in the interest of justice and convenience can allow the parties to file their complaint together for the enforcement of their fundamental rights.

But the Court still proceeded to rely on the decision based on the FREP Rules of 1979 made in **KPORHAROR's case**, to conclude that:

> The decision of this Court in Kporharor's case (supra) is the current decision of this Court. By the doctrine of stare decisis I am bound by the earlier decision of this Court. I cannot deviate from it.

As rightly pointed out by the learned Counsel for the Appellants, the decision in **UDO v ROBINSON (supra)**, relied on the earlier decision of this Court in **KPORHAROR v YEDI (supra),** which based its decision on the 1979 FREP Rules, this case, which is clearly brought under the FREP Rules, 2009, is distinguishable.

There is no doubt that in Section 46(1) of the 1999 Constitution which grants right of action in fundamental rights enforcement it used the singular language. The Section used the words "Any person who alleges..." However, it is trite law of interpretation of statutes that words in the singular which are used in a statute are interpreted to include the plural and words in the plural to include the singular. In interpreting Section 215 of the Criminal Procedure Act, the Supreme Court applied Section 14 of the Interpretation Act in the case of **UDEH v THE STATE (1999) LPELR-3292(SC),** and the Court, per His Lordship Iguh, JSC, held at pages 16 – 17, paras. F – A, as follows:

> ...Section 14 of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990 which stipulates as follows "In an enactment - (a) .... (b) words in the singular include the plural and words in the plural include the singular." It is thus clear, on the application of Section 14(b) of the Interpretation Act, that no violence can be done to the provisions of

Section 215 of the Criminal Procedure Act if the word "persons" is read into the word "person" therein used."

Specifically, for fundamental rights proceedings, the Preamble to the Fundamental Rights (Enforcement Procedure) Rules, 2009 which is the Rules made pursuant to Section 46(3) of the 1999 Constitution, had taken into consideration this basic rules of interpretation and had provided in Paragraph 3(c) of the Preamble that:

(c) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) Anyone acting in his own interest;

(ii) Anyone acting on behalf of another person;

(iii) Anyone acting as a member of, or in the interest of a group or class of persons;

(iv) Anyone acting in the public interest; and

(v) Association acting in the interest of its members or other individuals or groups.

From the above provisions of the 2009 FREP Rules and the Supreme Court decision on interpretation of statutes in **UDEH v THE STATE (supra)**, it is expressly clear that it is not only individuals that can institute an action for enforcement of fundamental rights. As rightly contended by the learned Counsel for the Applicants, the approach of the courts has generally been to give vent to the intendment of the Fundamental Rights (Enforcement Procedure) Rules, 2009, to the effect that several parties may institute fundamental rights proceedings provided the basis of the complaint arose from the same cause of action.

This position has been given vent by the recent decision of this Court in the case of **OLUMIDE BABALOLA v AGF (2018) LPELR-43808(CA)** where Ikyegh, JCA held at pages 12 – 14, paras, D – B as follows:

> The issue of standing to sue was widened by the Supreme Court in Fawehinmi v. Akilu (supra) in 1987 after Adesanya (supra) was decided in 1981 that "it is the universal concept that all human beings are brothers assets to one another" especially in this country where the socio cultural concept of 'family' includes nuclear family or extended family which transcends all barriers (to paraphrase Eso, J.S.C, in Fawehinmi v. Akilu (supra). Then in Fawehinmi v. The President (supra) Aboki J.C.A., held inter alia that - ".....since the dominant objective of the rule of law is to ensure the observance of the law, it can best be achieved by permitting any person to put the judicial machinery in motion in Nigeria whereby the citizen could bring an action in respect of a public derelict. Thus, the requirement of

locus standi becomes unnecessary in constitutional issues as it merely impede judicial functions." (My emphasis). To demonstrate that public spirited litigation in fundamental rights related cases is now the norm, the FREPR 2009 made pursuant to Section 46(3) of the 1999 Constitution and thus clothed with constitutional force expanded the horizon of locus standi in fundamental rights cases in paragraph 3(e) thereof thus - "3(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any nongovernmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: ?(i) Anyone acting in his own interest; (ii) Anyone acting on behalf of another person; (iii) Anyone acting as a member of, or in the interest of a group or class of persons; (iv) Anyone acting in the public interest, and (v) Association acting in the interest of its members or other individuals or groups.

It must also be pointed out that whilst the decision of this Court in KPORHAROR's case (supra) which was followed in **UDO v ROBSON (supra)** were essentially based on the 1979 FREP Rules, the decision in **OLUMIDE BABALOLA v AGF & ANOR (supra)**, was based on the 2009 FREP Rules, which is the extant applicable procedure for enforcement of fundamental rights actions.

I observe that in refusing to apply the decision of this Court in BABALOLA v AGF (supra), the learned trial judge had at pages 92 – 93 tried to make a distinction

between a right to sue and the procedure adopted in bringing an action. With due respect to the learned trial judge, I do not agree with that distinction in respect of this case. The issue clearly deals with whether or not there is a collective right to institute an action under the fundamental rights enforcement procedure rules. It is therefore one which deals squarely with the interpretation of the right of action in fundamental rights enforcement as provided in Section 46(1) of the 1999 Constitution and as furthered by the Fundamental Rights (Enforcement Procedure) Rules, 2009 made pursuant to Section 46(3) of the same Constitution. As shown above, unlike the 1979 FREP Rules, the 2009 FREP Rules has in line with the trite law of interpretation expanded the right of action in fundamental rights proceedings to include joint action by several persons provided the basis of the complaint arose from the same cause of action.

Beyond this Court, the Supreme Court had tacitly in its recent decisions countenanced joint applications in fundamental rights cases. In **DIAMOND BANK PLC v OPARA & 2 ORS (2018) LPELR-43907(SC),** which is an appeal an appeal arising from a fundamental rights joint application initiated at the Federal High Court, Port Harcourt, the Supreme Court upheld the judgment of this Court which granted the prayer of the Applicants. Also in **FBN PLC & 4 ORS v AG FEDERATION (2018) 7 NWLR (Pt. 1617) 121,** the Apex Court upheld the judgment of this Court in joint application by 5 applicants for enforcement of fundamental rights and even awarded compensation to the 5th Applicant which this Court omitted to award.

It is instructive to state that those decisions of the Apex Court have invariably reinforced the preamble of the FREP Rules, 2009 which allows for joint fundamental rights applications, as well as the provisions of Section 14 of the Interpretation Act which requires that in the interpretation of Section 46(1) of the 1999 Constitution, the singular word "any person" should be construed to include "persons".

I need to add that no set of cases foster public confidence in the judiciary as an adjudicatory system of redress, than fundamental rights cases. This is primarily because most human rights enforcement cases are complaints by seemingly "weak" individual members of the public against apparently "powerful" state actors. For this reason, a narrow interpretation of Section 46 of the 1999 Constitution and the FREP Rules, 2009 that springs which restricts access in fundamental rights proceedings to only individuals will unduly retard the objective of ensuring the promotion and due observance by all, of the fundamental human rights so constitutionally guaranteed.

It is for all the foregoing reasons that I resolve the third issue in favour of the Appellants and hold that the trial court was wrong to have relied on the decisions of this Court in **UDO v ROBSON (supra) and KPORHAROR v YEDI (supra)** to hold that a joint application cannot be validly brought under the provisions of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

Resolved in favour of the Appellants as the third issue is, however, the first two issues in this appeal which also relate to the competence of the Appellants' suit

before the trial court have been earlier resolved against the Appellants. I have already found in resolving those issues, that the trial court was right in its judgment declining jurisdiction to entertain the Appellants' suit, not being a cause of action that can be brought under the fundamental rights civil procedure rules, but one that falls under executive/administrative actions/decisions of a Federal Government agency, which by Section 251(1)(r) of the 1999 Constitution falls under the exclusive jurisdiction of the Federal High Court. Having so held, I could only determine that this appeal is in the final analysis lacking in merit.

Accordingly, this appeal is hereby dismissed and the decision of the High Court of Ogun State, per Honourable Justice A. A. Akinyemi delivered on the 15th of July, 2020 striking out the Appellants' suit is hereby affirmed. Cost of N100,000.00 is hereby awarded against the Appellants.

ABBA BELLO MOHAMMED
JUSTICE, COURT OF APPEAL

Appearances:

Olumide Babalola Esq, for the Appellants.

A. K. Isola-Osobu Esq, for the Respondent.

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REGISTRAR
COURT OF APPEAL
OLUBIYI OMOSULI
DATE: 30-9-21

APPEAL NO. CA/IB/291/2020
FOLASADE AYODEJI OJO JCA

I have read in advance, the lead judgment just delivered by my learned brother, **ABBA BELLO MOHAMMED, JCA** and I completely agree with him that this appeal is devoid of merit and deserve to be dismissed.

The 2nd Appellant who had registered with the Respondent for the issuance of the National Identity Card applied to her for rectification on his date of birth captured on the National Identification Number Slip issued to him. The Respondent requested him to pay the sum of fifteen thousand Naira (N15,000.00) for the correction to be effected. The Appellants who are of the view that a demand for payment of a fee for the correction of the error by the Respondent is a breach of the 2nd Appellant's constitutional right to private and family life instituted an action at the lower Court under the Fundamental Rights (Enforcement Procedure) Rules.

Order II Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 provides as follows:

> **"Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur for redress"**

It is trite that it is only actions founded on a breach of the fundamental rights guaranteed in the Constitution that can be enforced under the Rules. The facts relied upon by an applicant must therefore

CA/IB/291/2020

{UGOCHUKWU ANTHONY OGAKWU, JCA}

The Appellants herein, were the Applicants before the High Court of Ogun State in an application for the enforcement of the fundamental right to private and family life as guaranteed in Section 37 of the Constitution of the Federal Republic of Nigeria, 1999, as amended. The lower court in its decision declined jurisdiction to entertain the application on the grounds that the Appellants' grouch was not in respect of the infringement or threatened infringement of any fundamental right; but a protest on the fees demanded by the Respondent for the rectification of the error in the date of birth of the 2nd Appellant. The lower court consequently held that the action was not cognisable under the specialised procedure for the enforcement of fundamental rights. The lower court further held that joint applicants cannot bring an application for the enforcement of fundamental rights.

Two principal issues pertaining to the competence of the action as held by the lower court have been raised in this appeal. Firstly, whether the action is indeed one for the enforcement of fundamental rights, and secondly, and which is of more contemporary interest, whether there can be joint applicants in an action for the enforcement of fundamental rights. *Post haste*, if indeed the action is not cognisable under the fundamental rights enforcement procedure, then the issue of whether joint applicants can bring a fundamental right enforcement action becomes moot and academic in the circumstances of this matter, since the action would then not be a fundamental right enforcement action and therefore it will be immaterial if several applicants brought the action.

The leading judgment of my learned brother, *Abba Bello Mohammed, JCA*, which has just been delivered was made available to me in draft and I agree with his reasoning and conclusion that the lower court rightly held that the Appellants' action is not primarily and principally for the enforcement of fundamental rights, but a challenge on the

joint applicants will be incompetent. Let me hasten to state that even if the phrase *any person* denotes singular, by Section 14 of the Interpretation Act, in construing enactments, words in the singular include the plural and words in the plural include the singular: **COKER vs. ADETAYO (1996) 6 NWLR (PT 454) 258 at 266, UDEH vs. THE STATE (1999) LPELR (3292) 1 at 16-17** and **APGA vs. OHAZULUIKE (2011) LPELR (9175) 1 at 24-25.**

Furthermore, the adjective employed in the provisions of Section 46 (1) of the 1999 Constitution and Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 is *any*. It qualifies the noun *person*. The *Merriam-Webster Online Dictionary* defines the word *any* as an adjective which could be one or more, an undetermined number; and when used as a pronoun, the word *any* can be singular or plural in construction. See also the online dictionary, *Dictionary.com*. So the word *any* and the phrase *any person* cannot be construed as referrable and restricted to an individual. No. It conduces to more than one individual.

In the circumstances, it is my considered and informed view that in so far as the applicants have a common grievance and common interest, and that it is on the same factual situation that they predicate the evisceration of their fundamental rights; they can bring a joint application for redress. It is for the foregoing reason and the more elaborate and comprehensive reasoning and conclusion in the leading judgment of my learned brother, that I avow my concurrence with the conclusion in the leading judgment that joint applicants can bring an application for the enforcement of their fundamental rights.

My learned brother, *Abba Bello Mohammed, JCA*, referred to the decision of the Supreme Court in the cases of **DIAMOND BANK PLC vs. OPARA (2018) 7 NWLR (PT 1617) 92** and **FIRST BANK OF NIG. PLC vs. A- G FEDERATION (2018) 7 NWLR (PT 1617) 121,** where joint applications for enforcement of fundamental rights were favourably considered and compensation awarded by the apex court. By all odds, the

Respondent's decision to charge fees for the rectification of the 2nd Appellant's date of birth on the National Identity Database. See **SEA TRUCKS NIG LTD vs. ANIGBORO (2001) 1 MJSC 111 at 127 and 130, TUKUR vs. GOVERNMENT OF TARABA STATE (1997) 6 NWLR (PT 510) 549, FRN vs. IFEGWU (2003) 8 MJSC 36 at 57** and **ADEYANJU vs. WAEC (2002) 13 NWLR (PT 785) 479 at 487.** Though the implication of this makes immaterial the number of applicants who have brought the action, I would still, even if perfunctorily, consider the legal position on joint applicants in an application for the enforcement of fundamental rights.

There has been a good number of conflicting decisions of this Court on the point, the most recent decisions which I was able to find being **GOVT OF ENUGU STATE vs. ONYA (2021) LPELR – 52688 (CA)** delivered by the Enugu Division on 28th January 2021, which held that joint applicants can bring an application to enforce fundamental rights. *Au contraire,* in **AEDC vs. AKALIRO (2021) LPELR – 54212 (CA)** which was delivered by the Makurdi Division on 31st March 2021, it was held that an application by joint applicants was incompetent. The right to seek redress for evisceration of fundamental rights is by Section 46 (1) of the 1999 Constitution vested in *any person.* The said stipulation reads:

> *"Any person who alleges that any of the provisions of 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."*

See also Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009, which is similarly worded for *any person* to seek redress. The critical question is whether the phrase *any person* as used in the provision can be construed to include more than one person or whether it is limited to only one person. Where it is wide enough to include more than one person, then it necessarily follows that joint applicants can be bring an application; but where it cannot be so construed then an application by

question of the competence of the action having been brought by joint applicants was never a live issue in the appeal before the Supreme Court, so it made no pronouncement, whether directly or obliquely, in that regard. Howbeit, a question as to whether joint applicants can maintain an action for the enforcement of fundamental rights, is a question which goes to the competence of the action and *a fortiori*, the competence of the court to entertain the action, since it is a contention that the action was not initiated by due process of law: **MADUKOLU vs. NKEMDILIM (1962) LPELR (24023) 1 at 10.** So, by parity of reasoning or analytical reasoning, it seems to me that the Supreme Court would have made the pronouncement, for good order sake, if the action was incompetent on account of having been initiated by a joint application, instead of proceeding to award compensation in favour of the joint applicants as it did in the said cases, if the actions were otherwise incompetent.

In a summation, I agree with the indubitable conclusion articulated in the leading judgment, that premised on the fact that the lower court rightly held that the Appellants main grievance was not for the enforcement of fundamental rights, that this appeal is bereft of any merit. Therefore, I equally join in dismissing the appeal and on the same terms as contained in the leading judgment.

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COURT OF APPEAL
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UGOCHUKWU ANTHONY OGAKWU
JUSTICE, COURT OF APPEAL

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IN THE HIGH COURT OF JUSTICE
OGUN STATE OF NIGERIA
IN THE ABEOKUTA JUDICIAL DIVISION
HOLDEN AT ABEOKUTA

BEFORE: THE HONOURABLE JUSTICE A. A. AKINYEMI – JUDGE
DELIVERED ON WEDNESDAY THE 15TH DAY OF JULY, 2020

SUIT NO: AB/83/20

BETWEEN:

1. **INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE**
2. **MR. ADEYEMI ATAYERO** ... **CLAIMANTS**
3. **MR. OLASUNKANMI BELLO**

AND

THE NATIONAL IDENTITY MANAGEMENT COMMISSION ... **DEFENDANT**

JUDGMENT

By Originating Summons dated 12th February, but filed on the 17th of February, 2020, the Claimants raised the following questions:

1. Whether or not by the construction of Section 37 of the Constitution of the Federal Republic of Nigeria, 1999, (As amended), the Respondent act of demanding for payment for rectification/correction of personal data is likely to interfere with the Applicants' right to private and family life?

2. Whether or not by the provision of Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019, (NDPR), the Applicants can request for rectification/correction of personal data from the Respondent free of charge?

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onsequently, the Claimants sought the following reliefs:

A **DECLARATION** that demand for payment for rectification/correction of personal data of the Applicants is likely to violate the Applicants' fundamental rights to private and family life guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR).

2. **A DECLARATION** that rectification/correction of persona data of the Applicants by the Respondent ought to be done without payment by virtue of section 37 of Constitution of the Federal Republic of Nigeria 1999 (As Amended) and Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR).

3. **AN ORDER** of this Honourable Court mandating the Respondent to rectify/correct personal data of the Applicants pursuant to section 37 of Constitution of the Federal Republic of Nigeria 1999 (As Amended) and Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR) free of charge.

4. **AN ORDER OF PERPETUAL INJUNCTION** restraining the respondent from further demanding payment for rectification/correction of personal data of the Applicants and or/all other data subjects pursuant to section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) and Article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR).

5. **AND FOR SUCH OTHER CONSEQUENTIAL ORDERS** as this Honourable Court may deem fit to make in the circumstance.

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The Summons has in support, a Statement, an Affidavit, and a Written Address. The Defendant filed a Counter-Affidavit and a Written Address thereto. It also filed a Notice of Preliminary Objection to the suit. The Claimants filed a Written Address in response to the Notice of Preliminary Objection, while the Defendant also filed a Reply on Point of Law, to the same. Both the Preliminary Objection and the Originating Summons were heard together, with the consent of the two parties. However, the Notice of Preliminary objection was taken first, before the Originating Summons.

The Defendant's Preliminary Objection is founded on three grounds. First, that this suit should have been filed before the Federal High Court, since the defendant is an agency of the Federal Government of Nigeria, and the grievance of the Claimants concerns its administrative decision. Second, that it is not permissible for the Claimants to file a joint action under the Fundamental Rights Enforcement Rules. Third, that, there is no cause of action disclosed.

In view of the primacy of the issue of jurisdiction, I shall proceed to resolve it first. In arguing the objection, learned counsel to the Defendant, Mr Isola-Osobu argued that the complaint of the Claimants against the decision of the defendant demanding payment of N15000 (Fifteen Thousand naira) for the rectification/correction of the personal data of the 2nd Claimant, does not relate to enforcement of fundamental human rights of the Claimants, but is an administrative decision or procedure of the defendant, in respect of which only the Federal High Court has jurisdiction. He referred to section 251(1)(a), (q) and (r)of the 1999 Constitution of the Federal Republic of Nigeria (as amended), and relied on a number of decided cases, particularly **CBN V OKOJIE (2015) LPELR-24740(SC), and LADOJA V INEC (2007) LPELR-1738(SC).**

On the second ground, Mr Isola-Osobu submitted, relying on the case of **OPARA V S.P.D.C LTD (2015) 14 NWLR (PT 1479) 307**, that multiple claimants cannot jointly file a suit to enforce their fundamental human right. Rather, each of them must sue separately.

On the third and final ground, learned counsel submitted that the nature of the complaint of the claimants does not fall under the category of human rights entrenched in the constitution, particularly section 37 relied on by the claimants, which deals with private and family life. He relied on the cases of **DONGTOE V CIVIL SERVICE COMMISSION OF PLATEAU STATE (2001) 19 WRN 125; and EGBUONU V BORNO RADIO TELEVISION CORPORATION (1993) 4 NWLR (PT 285) 13**, and urged the court to hold that there is no cause of action disclosed.

In his reply, learned counsel to the claimants, Chukwudi Ajaegbo Esq, submitted, on the first ground, that this court has concurrent jurisdiction with the Federal High Court to hear this case, as it deals mainly with a breach of the fundamental human right of the claimants. He relied on the following cases: **EFCC V REINL (2020) LPELR-49387(SC); EFCC V LIGBOERUCHE (2020) 4 NWLR PT 1713) 141; FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA V OLUTAYO (2017) LPELR-43827; COMMISSIONER OF POLICE V ABENI (2019) LPELR-7096; ACHEBE V NWOSU (2002) LPELR-7096, and OMOSONWAN V CHIEDOZIE (1998) 9 NWLR (PT 566) 477.**

On the second ground, learned counsel submitted that the case of OPARA V S.P.D.C (supra) is not applicable because it was decided under the repealed Fundamental Rights Enforcement Rules of 1979, whereas, this suit is brought under the extant 2009 Fundamental Rights Enforcement Procedure Rules, which allows more than one claimant to jointly institute

an action for the protection of their fundamental human rights. He relied on the following cases: **OKAFOR V LAGOS STATE GOVERNMENT (2016) LPELR-41066(CA); BABALOLA V AGF (2019) LPELR-25610 (CA); GRONER V EFCC (2014) LPELR-24466(CA); ORKATER V EKPO (2014) LPELR-25525(CA); UZOUKWU V EZEONU II (1991) 6 NWLR (PT 200) 768; and NWAIGWE V NWAIGWE (2018) 32 WRN 105.**

On the third ground, learned counsel to the claimants argued that data protection rights come within the rights protected by section 37 of the Constitution. He relied on the case of **NWALI V EBSIEC (2014) LPELR-23682(CA)**. On the individual's right to rectification of his personal data, he referred to the case of **GOOGLE SPAIN SL, GOOGLE INC V AGENCIA ESPANOLA DE PROTECCION DE DATOS (AEPD) CASE C-131/12 (2014)** and a few others. He concluded by submitting that the provisions of the Nigeria Data Protection Regulation (NDPR), are aimed at protecting personal data and the right to privacy, therefore, the cause of action disclosed in this case is rooted in the allegation of violation of right to privacy.

I find it necessary to do a brief recap of the facts of this case as presented by the Claimants. The 2nd Claimant had registered for the issuance of the National Identity Card, with the Defendant. However, the National Identification Number Slip issued to him bore a month of birth different from his actual month of birth. The 2nd Claimant then applied to the Defendant for the rectification/correction of his date of birth. To have this done, the Defendant requested the 2nd Claimant to pay a fee of N15.000.00 (Fifteen Thousand Naira), in accordance with its laid down official policy and procedure. The 2nd Claimant objected to this request for payment claiming that it violated his fundamental right to private and family life as guaranteed by section 37 of the 1999 Constitution of Nigeria. It was on account of this that he and the other Claimants have brought this suit. It is

nowhere shown in the processes filed by the Claimants from whose end the error in the date of birth of the 2nd Claimant emanated. The 3rd Claimant has not alleged that a similar request for payment was made to him or that there was any need or request by him for the rectification of his own identification data. He is only introduced and described as a Nigerian Citizen with a National Identification Number. The 1st Claimant is a Civil Society Organization, but has also not alleged any specific wrong against it, by the defendant.

The first ground of the objection is that this court lacks jurisdiction because the subject matter involves the administrative decision or operational procedure of a federal government agency, rather than the breach of a fundamental human right, as alleged by the claimants. Jurisdiction is the lifeblood of a case, being the power of a court to hear and decide a matter in controversy. It presupposes the existence of a duly constituted court which has control over the subject matter and the parties. Where it is non-existent, the court lacks the competence to hear the case and must hands off. **See: MADUKOLU VS. NKEMDILIM(1962) 2 SCNLR 341; OBI VS. INEC(2007) LPELR-24347(SC) WOBON VS. KAKIEY(2017) LPELR-42988(CA).** It is for this reason that it must be first determined whenever it is raised, so that both the court and the parties will not embark upon a futile exercise.

What is being challenged is the decision of the Defendant to charge the 2nd Claimant the sum of N15,000.00(Fifteen Thousand Naira) for the correction of an error in the data recorded for him during his registration for the issuance of the national Identity Card. The issue to be resolved in this ground of the objection is whether this decision is an infraction of the fundamental human right of the 2nd Claimant so as to vest jurisdiction in

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this court, or whether it is a mere executive or administrative act or decision of the defendant, so as to deprive this court of jurisdiction, and locate it in the Federal High Court.

It is the right of every citizen of Nigeria to be registered and issued with a national identification card. From the facts of this case, that right of registration has not been denied any of the claimants. In fact, both the 2nd and 3rd Claimants have shown that they have been duly registered and issued with National Identification Numbers by the Defendant. The claimants allege that the demand for payment for the correction of the date of birth of the 2nd claimant infringes upon his constitutional right to private and family life, so as to bring it within the jurisdiction of this court, while the defendant contends otherwise.

Section 37 of the 1999 Constitution of the Federal Republic of Nigeria provides:

> ***"The privacy of citizens, their homes, correspondences, telephones, conversations and telegraphic communications is hereby guaranteed and protected."***

In the case of **FRN V DANIEL (2011) LPELR-4152(CA),** cited and relied upon by the claimants, the court reiterated that:

> ***"Undoubtedly, by virtue of the provision of section 37 of the 1999 Constitution, the privacy of every Nigerian Citizen, his home, correspondences, telephonic and other telegraphic communications are cherishingly guaranteed and protected."***
>
> ***In NWALI V EBSIEC (2014) LPELR-23682(CA), the Court of Appeal also held that: "Privacy of Citizens is***

general and is not limited to any aspect of the person or life of a citizen."

These two decided cases clearly explain the scope and ramification of the right guaranteed under section 37 of the Constitution. The kernel of both the provision of section 37 of the Constitution and these illuminating decisions is, to my mind, that the privacy of a citizen of Nigeria shall not be violated. From these decisions, privacy, to my mind, can be said to mean the right to be free from public attention or the right not to have one's personal affairs exposed to public glare without one's consent or approval. It also includes the right not to have others intrude into one's private space uninvited or without one's approval. It means to be able to stay away or apart from others without observation or intrusion. It also includes the protection of personal information from others. This right to privacy is not limited to his home, but extends to anything that is private and personal to him including communication and personal data. From the facts of this case, there is no evidence that the defendant or its staff or agents intruded or attempted to intrude into the privacy or personal territories of the Claimants or obtain their data without their consent. It would have been different if the Defendant obtained and retained the Claimants' data, without their consent. **See: IBIRONKE VS. MTN(2019) LPELR-4783(CA).** It would also be an invasion of the claimant's privacy if the defendant gave unauthorised access to the Claimants' data to third parties. **See: EMERGING MARKETS VS. ENEYE (2018) LPELR-46193(CA).** To the contrary, the facts show that the defendant accorded recognition to and allowed an exercise of the 2nd and 3rd Claimants' rights, by granting them registration, as Nigerian citizens, entitled to be registered for identification as Nigerians. Also, from the facts presented before this court, the demand for payment of a fee was not a condition precedent for registration, but

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something that came up after registration, as administrative fee for correction of the error in the data supplied by the 2nd Claimant, for his registration. As I have earlier noted, the claimants have not asserted that the error in the 2nd Claimant's date of birth arose as a result of the Defendant's default. I am unable to fathom how this requirement constitutes an infraction to the Claimants' right to privacy under section 37 of the Constitution. This suit is clearly a challenge of the power of the Defendant to charge a fee for the rectification or correction of the error contained in the 1st Claimant's birth date, and not a challenge of a denial of his right to be registered for identification as a Nigerian citizen. Section 251 (1) (r) of the Constitution of Nigeria 1999 provides:

> ***"251. (1) Notwithstanding anything to the contrary contained in the Constitution and in addition to such jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters,***
>
> ***(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; .."***

The decision of the Defendant, a Federal Government Agency, to charge a fee for its services, is clearly an executive/administrative one, in my humble view. The courts have held, that suits challenging executive and administrative decisions of Federal Government Agencies fall within the exclusive jurisdiction of the Federal High Court. **See: NEPA V EDEGBENRO (2002) 18 NWLR (PT 798) 79; ELELU-HABEEB V AGF (2012) 2 SC (PT**

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1) 145; **and CBN V OKOJIE (2015) LPELR-24740 (SC).** That means that State High Courts, such as this court, cannot exercise jurisdiction in such matters. The decisions relied upon by the claimants' counsel, do not support his argument and are clearly distinguishable from this case. In **EFCC V RENL (supra),** the Supreme Court held that the State High Court had jurisdiction because the grievance of the claimant fell within the purview of fundamental human rights as enshrined in Chapter Four of the Constitution, rather than being a challenge to the administrative actions of the EFCC. Their Lordships held: **"So long as the enforcement of the applicant's fundamental right is the main claim in the suit and not an ancillary claim, the Federal High Court and the State High Courts, including the High Court of the FCT, have concurrent jurisdiction to entertain it."** All the other cases cited by the claimants counsel including **EFCC V LIGBOERUCHE (supra); FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA V OLUTAYO (supra); and COMMISSIONER OF POLICE V ABENI (supra),** all emphasised that the State High Courts would only have jurisdiction in a matter involving a Federal Government Agency under the Fundamental Right Enforcement Rules, where and if, the main claim of the claimant is for the enforcement of a fundament right guaranteed under Chapter IV of the Constitution. **See also: NIGERIAN RAILWAY CORP VS. NWANZE(2007) LPELR-4616(CA).** Considering the facts disclosed in this case by the Claimants, I am of the view that this court has no jurisdiction to entertain this suit. Let me also add that the provisions of the Nigeria Data Protection regulations, (2019) cannot confer a jurisdiction on the court, which the Constitution has not given it. It is an inferior legislation and must be construed, subject to the Constitution. This ordinarily, should be the end of the matter. However, in the event that I am

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wrong, on this first and most important ground of the objection, I shall proceed to examine the other grounds.

The second ground is that the claimants cannot bring a common or joint action to enforce their fundamental rights, but that they should have sued individually, Learned Counsel to the Claimants has cited a number of decided cases by the Court of Appeal to support his argument that this joint claim is competent. However, the cases cited by him, which I have earlier referred to, have either been departed from by the Court of Appeal, or are not relevant to the circumstances of this case. The extant position of the law is as stated in the cases of **KPORHAROR & ANOR V YEDI & ORS (2017) LPELR-42418 (CA), and UDO V ROBSON (2018) LPELR-45183 (CA).** In the later case, his lordship ADAH JCA held:

> ***"The contention of the learned counsel for the Respondents that it is proper in law for two or more persons to apply jointly for the enforcement of their fundamental rights cannot be sustained. The decision of this court in KPORHAROR's case, (supra), is the current decision of this Court. By the doctrine of stare decisis I am bound by the earlier decision of this court. I cannot in any way deviate from it. I hold in the circumstance that it is not proper to join several applicants in one application for the purpose of securing the enforcement of their fundamental rights. This issue is resolved in favour of the Appellant."***

The case of **OLUMIDE BABALOLA V AGF (2019) LPELR-25610(CA),** cited by the Claimants' counsel dealt largely with the issue of locus standi, rather than the filing of a joint action by two or more applicants. Locus standi,

which simply means, the legal capacity or standing of a Claimant to institute of an action by more than one person. A person may have the standing to sue, yet have his suit disabled by the procedure he has adopted. The standing of the Claimants is not the issue in this instance but the manner in which the Claimants have sued. Consequently, the case of **BABALOLA VS. AGF(SUPRA)** is distinguishable from this case and therefore, inapplicable. I uphold the submissions of learned counsel to the defendant, Mr Isola-Osobu, that this suit is equally incompetent on this ground.

The last and final ground of the objection is that it does not disclose a cause of action, in that the grievance of the Claimants does not come within the purview of section 37 of the Constitution on which their case is founded. I have somewhat indirectly dealt with this issue while resolving the first ground on jurisdiction. 'Cause of action' refers to the set of facts averred by a Claimant, which, if he is able to prove, will entitle him to the relief(s) he is claiming from the court. **See: GALADIMA VS. AG, KWARA(2004)LPELR-12626.** Put in proper context, it would mean in this case, asking the question: 'assuming that the Claimants are able to prove their averment that the defendant asked the 2nd claimant to pay the sum of N15000,00 (Fifteen Thousand Naira) for the correction of his date of birth, would they be entitled to the reliefs sought by them for the enforcement of their fundamental rights?' I think not. This is because even if they prove that factual allegation, it would still not amount to a breach of their right to privacy under section 37 of the Constitution as I have already enunciated under the first ground. Section 37 relates to a totally different situation from the complaint of the claimants in this case. The demand for payment of N15000.00(Fifteen Thousand Naira) for the correction of the date of birth of the 2nd Claimant, has absolutely nothing to do with his privacy, in

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my view. Secondly, from the averments in the affidavit in support, neither the 1st Claimant nor the 3rd Claimant, has made any complaints against the Defendant. Only the 2nd Claimant averred that he was asked to pay N15,000.00(Fifteen Thousand Naira). So, the 1st and 3rd Claimants have not shown any cause against the Defendant, for without a grievance, there is no cause and without a wrong there can be no remedy. Accordingly, I agree with Mr Isola-Osobu, that this suit is bereft of a cause of action. Having resolved all the grounds of the preliminary objection against the Claimants, and in favour of the Defendant, I hold that it has merit and uphold it. In the light of this, I see no need to delve into the Originating Summons of the Claimants, as this court lacks jurisdiction to do so. Furthermore, the essence of a preliminary objection to jurisdiction being that the suit is incompetent, this action must necessarily abate upon the success of the Preliminary objection. **See: DANGANA VS. USMAN(2013) 6 NWLR (PT 1349)50; NIDOCCO LTD VS. GBAJABIAMILA(2013)14 NWLR(PT 1374) 350; and AKOMOLAFE VS. ILESANMI(2015) LPELR-25664(CA).** Consequently, the objection is upheld and the Originating Summons is hereby struck out.

Abiodun A. Akinyemi
Judge
15.07.20

Olumide Babalola Esq for the Claimants (with him O. A. Bashorun).
A. K. Isola-Osobu Esq. (with him A. Toba) for the Defendant.

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IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDEN AT ABEOKUTA, OGUN STATE
ON WEDNESDAY THE 9TH DAY OF DECEMBER, 2020
BEFORE THE HON. JUSTICE IBRAHIM WATILA
JUDGE

SUIT NO: FHC/AB/CS /85/2020

IN THE MATTER OF AN APPLICATION BY INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHT TO PRIVATE AND FAMILY LIFE

BETWEEN:

INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE - APPLICANT
(On behalf of data subjects whose personal data were exposed by the Unity Bank Plc)

AND

UNITY BANK PLC - RESPONDENT

JUDGMENT

This fundamental right action was commenced by an Originating Summons dated and filed on the 28th of August, 2020. The applicant is seeking for the following reliefs:

1. A DECLARATION that the respondent's privacy policy on its website - https://www.unitybanking.com/privacy violates the provision of ***Regulation 2.5 of the Nigeria Data Protection Regulation 2019.***

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2. A DECLARATION that the respondent's unauthorized exposure of personal data of data subjects on the Internet constitutes a personal data breach under ***Regulation 1.3 (xx11) of the Nigeria Data Protection Regulation 2019.***

3. A DECLARATION that the respondent's unauthorized exposure of personal data of data subjects on the Internet constitutes violation of the data subjects' right to privacy guaranteed by ***Section 37 of the Constitution of the Federal Republic of Nigeria 1999*** (as amended).

4. A DECLARATION that, by virtue of ***Regulation 2.10(a) of the Nigeria Data Protection Regulation 2019***, the respondent is liable to a fine of N10,000,000

5. AN ORDER mandating the respondent pay the sum of N10,000,000 (Ten Million Naira Only) to the account of the Federal Republic of Nigeria through the remit platform within seven days of delivery of judgment in this suit.

6. PERPETUAL INJUNCTION restraining respondent, its officers, agents and/or data processors from further interfering with the privacy rights of its data subject

7. AND FOR SUCH OTHER CONSEQUENTIAL ORDERS as this honourable court may deem fit to make in the circumstance.

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Upon the determination of the following questions:

i. Whether or not by the interpretation of ***Regulation 2.5 of Nigeria Data Protection Regulation 2019,*** the Respondent's privacy policy displayed on its website at https://www.unitybanking.com/privacy constitutes a violation which renders the Respondent liable to a fine under ***Regulation 2.10(a)*** of the same regulation?

2. Whether or not by the interpretation of ***Regulation 1.3(xxii) of Nigeria Data Protection Regulation 2019,*** the respondent's unauthorized exposure of data subjects' personal data on the Internet constitutes a personal data breach which renders the respondent liable to a fine under ***Regulation 2.10(a)*** of the same regulation?

3. Whether or not by the interpretation and construction of ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended), the unauthorized exposure of personal data of data subjects' by the respondent is not an interference with right to private and family life?

On the following grounds:

i. The applicant is a civil society organization which is committed to the enforcement and promotion of digital rights in Nigeria and empowered under ***Regulation 4.1(8) of the Nigeria Data Protection Regulation 2019*** (NDPR) to uphold the objectives of the regulation.

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ii. The respondent is a banking institution and data controller subject to the provisions of the Nigeria Data Protection Regulation 2019 (NDPR)

iii. Sometime in August 2020, the respondent exposed the personal data of over 53,000 data subjects on an Internet page without any legal basis.

iv. The respondent's privacy policy as published on its website https://www.unitybanking.com/privacy falls short of the provision of ***Regulation 2.5 of the Nigeria Data Protection Regulation.***

v. ***Section 37 of the Constitution of the Federal Republic of Nigeria***, 1999 (as amended) guarantees the right to freedom of privacy and family life.

vi. The respondent's unauthorized exposure of personal data of data subjects on the Internet interference and further likely to interfere with right to privacy and life.

The application was accompanied by a statement, affidavit in support and 4 exhibits, Exhibit 1 – 4

In the written address in support of the application, three issues were settled for determination i.e -

i. Whether or not by the interpretation of ***2.5 of Nigeria Data Protection Regulation 2019***, the respondent's privacy policy displayed on its website at https://www.unitybanking.com/privacy constitutes a violation which renders the respondent liable to a fine under ***Regulation 2.10(a)*** of the same regulation

ii. Whether or not by the interpretation of ***Regulation 1.3(xxii) of Nigeria Data Protection Regulation 2019***, the respondent's unauthorized exposure of data subjects' personal data on the internet constitutes a personal data breach which renders the respondent liable to a fine under ***Regulation 2.10(a)*** of the same regulation.

iii. Whether or not by the interpretation and construction of ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended) the unauthorized exposure of personal data of data subjects by the respondent is not an interference with right to private and family life.

Issue 1 and 2

Counsel submitted that the applicant has given evidence that the respondent has unlawfully transmitted personal data of thousands of data subjects on the internet without legal justification that the respondent's action runs afoul of ***Regulation 2.5 of the Nigeria Data Protection Regulation*** and therefore liable under ***Regulation 4.1(8) of the Regulation.***

Issue 3

Counsel submitted that ***Section 37 of the 1999 Constitution*** guarantees the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications and by the respondent act of publishing private information of its employees on its payment portal violated the said section. ***Federal Republic of Nigeria V. Daniel (2011) LPELR-4152 (CA); Commandant General, The Nigeria Security and Civil Defence Corps & Anor V. Ukpeye (2012) LPELR; Ezeadukwa V. Maduka (1997) 8 NWLR (Pt.518)635.***

Submits that respondent is liable to pay the fine as contained ***in Regulation 2.10 of the Nigeria Data Protection Regulation. Nosdra V. Exxon Mobil (2018) LPELR–44210 (CA).*** He urged the court to grant the applicant's prayer.

The respondent filed a 10 paragraph counter-affidavit on the 22nd of September 2020 and attached 2 exhibits – Exhibits DOA1 and DOA2. In written address in support, counsel formulated a sole issue to wit:

> ***Whether or not based on the strength of the Applicant's case, the Respondent has committed a breach of privacy rights of some of its data subjects as alleged by the Applicant.***

By way of preliminary argument, counsel to the respondent, Matthias Dawodu Esq. stated that the applicant does not have the *locus standi* to institute this action and has also failed to comply with the condition precedent to filling this action. Moreso, the main claims of the applicant cannot be sought under Fundamental Rights (Enforcement Procedure) Rules 2009.

Argument of sole issue

Counsel Matthias Dawodu Esq. submitted that there is no evidence before the court to show that the alleged 53,000 personal data leaked on the internet emanated from the respondent's job portal as alleged. That by the exhibits attached to the counter-affidavit, the applicant has not been able to prove his assertion that it was the respondent who leaked the data on the internet – ***Section 131(1) and (133) (1) of the Evidence Act 2011. SCC (Nig) Ltd V. Elemadu (2005) 7 NWLR (Pt.923) 28 at 63 para B.***

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That the law is settled, that it is not the business of court to grant speculative or hypothetical question. ***A.G Anambra State V. A.G Federation & 35 Ors (2005) 9 NWLR (Pt.931) 572 at 607 – 610***

He urged the court to dismiss the applicant's claim with substantial cost in the absence of evidence in support.

The respondent also filed a Notice of Preliminary Objection on the 14th of October, 2020 seeking for the following:

1. *AN ORDER of this Honourable Court declining jurisdiction to entertain and adjudicate upon this suit and dismissing and/or striking out the entire suit as the Applicant/Respondent lacks the requisite locus standi to institute same and/or represent data subjects whose personal data were allegedly exposed by the Applicant.*

2. *AN ORDER of this Honourable Court declining jurisdiction to entertain and adjudicate upon this suit and dismissing and/or striking out the matter in limine, the Respondent having failed to satisfy the necessary condition precedent for initiating the suit as provided under the Nigeria Data Protection Regulation.*

3. *AND for such further or other order(s) as this Honourable Court may deem fit and/or necessary to make in the circumstances of this suit.*

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On the following grounds

i. The respondent is not one of the 53,000 data subjects whose privacy rights were allegedly breached by the applicant.

ii. None of the 53,000 data subjects whose rights were breached have been made parties to this suit.

iii. The respondent not being one of the 53,000 data subjects whose personal data were allegedly exposed on the internet, lacks the locus standi to institute this suit.

iv. The respondent did not obtain the requisite consent to represent the 53,000 data subjects before the filing of this action in Court.

v. The Nigeria Data Protection Regulation ("the Regulation") did not authorize the respondent to take over the rights of data subjects.

vi. The respondent failed to comply with the condition precedent for instituting this suit by failing to report the alleged breach of the provisions of the Regulation to the Administrative Review Panel of National Information Technology Development Agency ("NITDA") for investigation and determination for appropriate redress.

vii. The suit is frivolous, incompetent and an abuse of the court process.

viii. This Honourable Court lacks the requisite jurisdiction to entertain this suit as presently constituted.

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The objection was supported by an affidavit and a written address. In the written address, counsel to the respondent/applicant *Matthias Dawodu Esq.* formulated 3 issues for determination

1. ***Whether the respondent has the requisite locus standi to institute this action on behalf of 53,000 data subjects which they sought to represent.***

2. ***Whether the condition precedent for the commencement of an action under the Nigeria Data Protection Regulation (NDPR) has been met in this case as to vest jurisdiction in the Honourable Court to entertain this Suit.***

3. ***Whether having regards to the rights contemplated under the Fundamental Rights (Enforcement Procedure Rules, 2009) this Court can assume jurisdiction over the reliefs sought by the respondent in its Originating Summons dated 27th August, 2020.***

ISSUE 1

Counsel submitted that the applicant's originating process has not shown that he has the *locus standi* to institute this instant action as he is not one of the 53,000 data subjects nor has he alleged the breach of its personal data to avail him remedy from Court.

Njoku Vs. Jonathan & Ors. (2015) LPELR – 2 4496 (CA)
Eghobamien Vs. Eghobamien (2013) 3 NWLR (Pt. 1341) 362

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Adesanya Vs. President, Federal Republic of Nigeria & 1Or. (1981) All NLR
Owodunni Vs. Registered Trustees of Celestial Church of Christ & 3 Ors. (2000) 10 NWLR (Pt. 675) 315

That a person alleging breach of fundamental right must be personally involved or acting on authority of those whose rights have been infringed upon.
B.B. Apugo & Ors Limited Vs. O.H.M.B. (2016) 13 NWLR (Pt. 1529) Pg. 206.
Ennie & Ors. Vs. Aluko & Ors. (2013) LPELR – 22157 (CA) Pg. 34 paragraphs A – D.

Moreso, the applicant's reliance on the ***Regulation 4.1 (8) of the NDPR (2019)*** as the basis for locus standi is misconceived that the applicant is not authorized to do so by ***Regulation 4.1 (4) of the Regulation***.

ISSUE 2

It was submitted that the applicant had not fulfill the condition precedent to instituting this action i.e. the need to report the alleged breach to the Administrative Review Panel of NITDA for investigation and redress.
Regulation 4.2. of the Nigeria Data Protection Regulation 2019.
Inakoju Vs. Adeleke (2007) 4 NWLR (Pt. 1025) 423 590 paragraphs G – H.
WAEC Vs. Adeyanju (2008) 9 NWLR (Pt. 1092) 270

ISSUE 3

Counsel submitted that the principal claims of the applicant/respondent in this suit relate to alleged breach of the provisions of NDPR and not for the enforcement of fundamental right and thus the court lacks the requisite jurisdiction to entertain the

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suit under *Fundamental Right (Enforcement Procedure) Rules 2009; Abdulhamid Vs. Akar (2006) 13 NWLR (Pt. 996) Pg. 127 @ 150 paragraph B – E.*
University of Ilorin Vs. Oluwadare (2006) 14 NWLR (Pt. 1000) pg. 751 @ 770 – 771 paragraphs H – A.
Madukolu Vs. Nkemdilim (1962) 2 SCNLR.
University of Calabar Vs. Ugochukwu (No.1) 2007 17 NWLR (Pt. 1063) Pg. 225 @ 246 paragraphs B – D.

The applicant filed a reply on point of law to the respondent's counter affidavit as well as a written address in opposition to the respondent's preliminary objection on the 19th of October, 2020. In the reply on point of law, counsel stated as follows:-

- That the respondent failed to respond to the issues formulated by them but went ahead to distill unrelated issues contrary to the provision of law as regards this. *NJC vs. Aladejana (2014) LPELR – 24134 (CA); Ugboaja Vs. Akintoye Sowemimo (2008) 16 NWLR (Pt. 1113)*

- That the respondents have admitted to the data breach by their internally generated report and thus admitted facts need no proof. *Din Vs. African Newspaper (1990) LPELR – 947 (SC); Afribank Nigeria Plc. v. Mr. Muftau Adigun (2009) 11 NWRL (Pt. 1152) 345.*

In the written address in opposition to the respondents' Notice of Preliminary Objection. Counsel adopted the issues raised in the preliminary objection and submitted as follows

ISSUE 1

It was submitted that the applicant being a civil society is conferred with the *locus standi* in this suit and perceived lack of it cannot be a ground for striking out or dismissal of the suit.

- ***Section 46 (1) of the 1991 Constitution.***
- ***Paragraph 3 (1) (e) of the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009***
- ***Abia State University, Uturu vs. Chima Anyaibe (1996) 1 NWLR (Pt. 439) 646 at 660 – 661.***
- ***Article 4.1 (8) of the NDPR***
- ***Dilly Vs. I.G.P. (2016) LPELR – 41416 (CA)***
- ***Olumide Babalola Vs. Attorney General of the Federation & Ors. (2018) LPELR- 43808 (CA).***
- ***Centre for Oil Pollution Vs. NNPC (2019) 5 NWLR (Pt. 1666) 518 @ 597 paragraph E.***

ISSUE 2

Counsel submit that there is no limitation provision or condition precedent required for the filling of fundamental right enforcement suit, and that the provision captured in ***Act 4.2 of Nigeria Data Protection Regulation Agency*** does not constitute a condition precedent.

UBA Vs. Johnson (2018) LPELR – 45073 (CA)

El-Rufai Vs. Senate of the National Assembly (2014) LPELR 2311 (CA)

A.G. Kwara State Vs. Adeyemo (2017) 1 NWLR (Pt. 1546) 210.

ISSUE 3

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Counsel submitted that the reliefs sought by the applicant are geared towards data protection as contemplated under ***Section 37 of the 1999 Constitution*** and thus grantable by this Court.

Nwali Vs. EBSIEC (2014) LPELR – 23682 (CA).

Harlsbury's Law of England Vol. 8 (1) 4th Edition 2003 re issue.

Anne Marie Couderc & Hachette Filipacchi Associes V. France

M.L. and W.W. V. Germany

Peck V. United Kingdom

Mr. Jean-Michel Aycaguer V. France

M.K. V. France (No. 19522/09)

Counsel urged the court to dismiss the respondent's objection for lacking in merit.

Respondent/applicant further filed a reply on point of law in response to the applicant's/respondent's written address of 15th October, 2020, wherein it was submitted that the applicant/respondent having not filed a counter affidavit to challenge the facts in the Notice of Preliminary Objection is deemed to have admitted facts therein.

Ahmadu & Anor. Vs. Yinusa (2010) LPELR-8601 (CA) Pg. 1112 paragraphs G – D.

He stated further that there is nothing before the Court to establish that the fundamental rights of any named citizen was ever or any attempt was made to violate such right. That the process has not been initiated by due process of law. ***Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341.***

He contended that the court lacks the requisite jurisdiction to entertain this suit under the Fundamental Right Enforcement Procedure Rules 2009 as the principal claim of

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the applicant/respondent has revealed nothing to show breach of private life of any named individual or need to secure the enforcement of such right as the allegation relates to breach of Nigeria Data Protection Regulation 2019

- *Abdulhamid Vs. Akar (2006) 13 NWLR (Pt. 996) Pg. 127 @ 150 paragraphs B – E.*

University of Ilorin Vs. Oluwadare (2006) 14 NWLR (Pt. 1000) Pg. 751 @ 770 – 771 paragraphs H – A.

On the issue of *locus standi*, counsel submitted that the applicant is not one of 53,000 data subjects whose rights were allegedly breached, it is also not a public interest hence he needs to seek their consent before instituting this action.

- *Centre for Oil Pollution Vs. NNPC (2019) 5 NWLR (Pt. 1666) 578 Dilly Vs. I.G.P. (2016) LPELR – 41416.*

Submits that for this instant claim to be properly situated within the provisions of Nigeria Data Protection Regulation, the conditions as stipulated by the NDPR in Regulation 4.2 must be complied with. ***Petroleum Training Institute & Ors. Vs. Juliana (2013) LPELR – 20311 (CA) Pg. 27 – 29 paragraphs F – D.***

Counsel urged the Court to grant the Preliminary Objection and strike out the suit

Resolution of Preliminary Objection

I have carefully considered the preliminary objection together with the arguments of learned counsel on the issues formulated. The essence of a preliminary objection is to terminate at infancy, or to nip in the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a court's proceedings. In other

words, it forecloses hearing of the matter in order to save time. See: ***Efet vs.I.N.E.C. (2011) 7 NWLR (Pt.1247) 423***; and ***A.P.C. vs. I.N.E.C. (2015) 8 NWLR (Pt.1462) 531 at 541. Jim-Jaja V. COP Rivers State & ors. (2012) LPELR-20621(SC); Allanah & ors v. kpolokwu & ors (2016) LPELR-40724(SC)***

Furthermore, where there is a preliminary objection, that objection should be determined first before going into the substantive matter. See: ***A.P.C. vs. I.N.E.C. (supra).***

The preliminary objection of the respondent/applicant borders on jurisdiction of this court to hear the instant suit. It is trite that the issue of jurisdiction strikes at the root of any cause or matter. Consequently, it raises the issue of competence of the Court to adjudicate in any particular case. In ***UTIH & ORS. V. Onoyivwe & ORS. (1991) LPELR-3436(SC)" PER BELLO, C.J.N.*** (P. 46, paras. C-D)

> ***"...jurisdiction is blood that gives life to the survival of an action in a court of law and without jurisdiction, the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise"***

Emerald Engineering Services Limited & anor V. Intercontinental Bank Plc. (2010) LPELR-19782(CA); Madukolu V Nkemdilim 1962 ALL NLR (PART 4) 587, (2001) 46 WRN; Sken Consult V Ukey (1981) 1 SC 6 Nwabueze V Okoye (2003) 10 WRN 123

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Learned counsel for the respondent/applicant argued three issues for determination in respect of the preliminary objection. It is true that the issues all bothers on the jurisdiction of this court, I will first of all address issue three and subsequently the rest

1. ***Whether the Respondent has the requisite locus standi to institute this action on behalf of 53, 000 data subjects which they purport to represent***

2. ***Whether the condition precedent for the enforcement of an action under the Nigeria Data Protection Regulation (NDPR) has been met in this case as to vest jurisdiction in the Honourable court to entertain this suit.***

3. ***Whether having regards to the rights contemplated under the fundamental Rights Enforcement Procedure Rules 2009, this court can assume jurisdiction over the reliefs sought by the Respondent in the originating summons dated he 27th of August 2020***

ISSUE 3

It is settled law that the jurisdiction of our courts is derived from Statute and the Constitution. Hence where the Constitution has declared that the Courts cannot exercise jurisdiction, any provision in any law to the contrary will be inconsistent with the provision of the Constitution and void. The 1999 constitution has settled how to seek redress for the breach of violated right once proved. ***Section 46(1) of the 1999 Constitution,*** states:

> *"Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state into him may apply to a High Court for the redress" (emphasis mine).*

It is clear therefore that applicant/respondent must allege that any of his rights contained in chapter four was/were contravened or infringed upon, is being infringed or is likely to be contravened. Therefore, before any action can be brought under the Fundamental Rights Enforcement Rules, 2009, they must primarily be reliefs that alleged breach of a fundamental right.

The court in the case of ***Igwe v. Ezeanochie (2009) LPELR-11895 (CA)*** gave a guide as to determining reliefs under fundamental right action when it stated

> *"Whenever the Court is confronted with an application brought under the Fundamental Right (Enforcement Procedure) Rules, it is imperative that the Court should critically examine the reliefs sought by the Applicant, the grounds for seeking the reliefs and the facts contained in the statement accompanying the application and relied on for the reliefs sought. Where the facts relied on disclose infringement of the fundamental right of the applicant as the main or basis of the claim, then it is a clear case for the fundamental Right (Enforcement procedure) Rules.*

In the case of ***Abdulhamid v. Akar (2006) 13 NWLR (Pt. 996) 127*** the issue of proper reliefs under Fundamental Human Rights application was also pronounced upon in the following words:

> *"The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the*

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principal relief sought is for the enforcement or for securing the enforcement of a fundamental right and not from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim for the enforcement of fundamental right. Thus, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right"

See also ***Federal Republic of Nigeria & Anor v. Ifegwu (2003) 15 NWLR (Pt. 842) 113, at 180. Tukur v. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549; and Sea Trucks (Nig) Ltd. v. Anigboro (2001) 2 NWLR (Pt. 696) 159.***

The question to answer then is whether going by the reliefs and the questions in the originating summons, the matter is one that can come under the Fundamental Rights Enforcement Procedure thus conferring jurisdiction on this court. The simple guide is that the main relief should be a fundamental right relief and not an ancillary relief, it is just like identifying a cause of action in a statement of claim. Where however, the main relief is not the enforcement of a fundamental right or securing the enforcement of a fundamental right the jurisdiction of the Court cannot be properly invoked or exercised as the Court will be incompetent to do so. ***EFCC v. THOMAS (2018) LPELR-45547(CA)***

I have carefully considered the entire process file by the applicant/respondent in this case, the build up to this case is as deposed in paragraph 7 and 8 of its affidavit as follows

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7. *Sometime in August 2020, the Respondent without any legal basis exposed the personal data of over 53, 000 of its data subjects to the internet*

8. *The respondent's database containing personal data of job applicants in their portal was also exposed to the internet with (sic) any legal basis...*

I have also perused exhibit 2, 3 and 4 attached in support of paragraph 8. Section 37 of the constitution states:

> ***The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."***

I refer to the reliefs and the question in the originating summons as well. The applicant/respondent sought for 6 reliefs on the face of the Originating Summons (reproduced earlier), there is no need to reproduce them here again. From the reliefs, I find two of the six reliefs seeking for declarations which fundamentally relates to the purported breach of ***section 37 of the 1999 constitution*** of 53,000 persons whom the applicant represents. The remaining 4 reliefs are related to certain provisions of the ***Nigeria Data Protection Regulation 2019***

Without delving into the merit of the substantive suit of whether section 37 of the 1999 constitution can apply, assuming without saying that it can apply, all these facts simply show that the enforcement of human right is not the principal relief but ancillary relief in this instant application. I will further express my displeasure at counsel by citing with the approval the dictum of Niki Tobi, JCA (as he then was) in the case ***of Peterside v. I. M. B. (1993) 2 NWLR (pt. 278) 712 at 718 - 719***, as follows:

> *It has now become a fashion or style for parties to push or force the provisions of Chapter IV into most claims which*

cannot in law be accommodated by the chapter. Parties at times take undue advantage of the general and at time nebulous provision of the chapter and try to tailor in their actions even when the size of the "cloth" does not fit into it. The provisions of Chapter IV though appear omnibus and at large both in their character and context are chained here and thereby Constitutional gadgets by way of safeguards. Counsel by way of his professional calling and expertise may dexterously frame a claim or relief to have the semblance of a breach of a constitutional right as contained in Chapter IV of the Constitution. He does this to give the matter a higher status in the litigation process... But where an action does not have a Constitutional flavor in the sense that the provisions of the Constitution are not breached, it cannot be elevated to the status of a Constitutional wrong. A trial Judge should in such circumstances be able to apply the eye of an eagle to scrupulously examine the character and context of the claim with a view to removing the chaff from the grain and come to grips with the camouflage or disguise in the action. He has to unveil the pretentious legal phraseology of the action and take an appropriate decision."

I have carefully perused the facts of this case and the reliefs sought in respect thereof. It is clear to me that the principal or main claim of the applicant relates to the purported exposure of personal data of 53, 000 by the respondent in line with the

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Nigeria Data Protection Regulation 2019. I hereby hold that this instant application is not proper to be brought under Fundamental Rights action.

ISSUE 1

It is trite law that Locus standi is the legal capacity to institute an action in a court of law. "The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before the court and not on the issues he wishes to have adjudicated. In ascertaining whether the respondent in this matter has the requisite *locus standi* to institute this instant action, it is the originating summons as well as the affidavit in support that will be looked at ***Ladejobi v Oguntayo (2004) 18 NWLR (Pt.904) 149 Musdapher, JSC at page 173*** had this to say: -

> *"In ascertaining whether the plaintiff or the plaintiffs have standing to initiate the proceedings, the statement of claim should be looked at. It is obvious from the decided authorities that the issue of locus standi does not depend on the success or the merits of the case but it is dependently on whether the plaintiff or the plaintiffs have sufficient interest or legal right in the subject matter of the dispute. In ascertaining whether a plaintiff in an action has locus standi therefore, facts deposed to in the statement and supporting affidavit must disclose a cause of action vested in him. It must also disclose the rights and obligations or interests which have been violated."*

See ***Adesokan v Adegorolu (1997) 3 NWLR (Pt.493) 261, (1997) 3 SCNJ 1 at 15; Adefulu v Oyesile (1989) 5 NWLR (Pt.122) 377 at 41; Momoh v Olotu (1970) 1 All NLR 117 and Oloriode v Oyebi (1984) 1 SCNLR 390 at 401,406 and 407; Senator***

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Abraham Adesanya v The President of Nigeria & Anor. (1981) 1 NCLR; SODIPO & ORS. V. OGIDAN & ORS. (2007) LPELR-3962(CA)

By paragraph 4 of the applicant/respondent's affidavit in support of originating summons to wit;

> 4. *The Applicant is a civil society organization of like-minded Nigerian Citizens registered under the Companies and Allied Matters Act with the Objectives of promoting and protecting digital rights of citizens which includes privacy and data protection...*

I have also seen exhibit 1 which is the certificate of the applicant's incorporation. Now it should not be forgotten that this action is brought under the Fundamental Right Enforcement Rules 2009 and Order 1 Rule 2 of the Rules 2009 construes an applicant under the Rules to mean: a party who files an application or on whose behalf an application is filed under these Rules.

Section 3(e) (iii) of said preamble provides: (e) The Court shall encourage and welcome public interest litigations in the human right field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) Any one acting in his own interest;

(ii) Anyone acting on behalf of another person;

(iii) Anyone acting as a member of, or in the interest of a group or class of persons;

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(iv) Anyone acting in the public interest, and

(v) Association acting in the interest of its members or other individuals or groups.

From the foregoing it is obvious that the applicant can have the locus standi to bring this action under (iv) and (v).

However, my concern is that the applicant has not shown sufficient interest to show that he is not just a meddlesome interloper. If and truly, 53,000 personal data of persons were breached, how come none of the said data subject is before the court? Assuming but not saying that the instant action is breach of the fundamental rights of such huge number of persons as in this case, how come there is no complaint or evidence of the existence of such persons before the court.

Moreso, does the act of the purported exposure of data comes within the purview of public interest litigation as envisaged by ***section 46(1) of the 1999 constitution*** and the Fundamental Right Enforcement Procedure Rules? From the facts and the evidence before the court, I do not think so. It is also notable that the applicant is basing this instant application on ***section 37 of the 1999 constitution*** as well as section several provisions of the Nigeria Data Protection Regulation 2019. However, it should be said that fundamental right action are sui generis and in a class on its own

ISSUE 2

Whether the condition precedent for the enforcement of an action under the Nigeria Data Protection Regulation (NDPR) has been met in this case as to vest jurisdiction in the Honourable court to entertain this suit.

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Regulation 4.2 of the NDPR states;

(1) Without prejudice to the right of data subject to seek redress in a court of competent jurisdiction, the agency shall set up an administrative Redress panel under the following terms of reference

(2) Investigation of allegations of any breach of the provisions of this regulation;

(3) Invitation of any party to respond to any allegations made against it within seven days

(4) Issuance of Administrative orders to protect the subject matter of the allegation pending the outcome of investigation

(5) Conclusion of investigation and determination of appropriate redress within twenty-eight days and

(6) Any breach of this regulation shall be construed as a breach of the provisions of the National Information Technology Development Agency(NITDA) Act of 2007

The applicant action is brought pursuant to ***Regulations 1.3(xxii), 2.5, 2.6, 2.10, 4.1(7) and 4.1(8) of the Nigeria Data Protection Regulation***. Respondent/applicant has submitted that failure to comply with the above provision of the regulation divest this court of jurisdiction.

It is a settled principle of law that a court is competent when-

(1) It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction;

(3) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction

Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Shuaibu v. Nigeria-Arab Bank Ltd. (1998) LPELR-3067(SC).

In ***Saude vs. Abdullahi (1989) 4 NWLR (Pt. 116) 342 at 387***, the Supreme Court held-as follows: "There is non-compliance with due process of law when the procedural requirements have not been complied with, or the pre-conditions for the exercise of jurisdiction have not been complied with. Condition precedent does not bar the applicant from seeking a redress from court, it only stalls or delay until certain condition have been complied with. - ***Nigercare Development Company Ltd. v. Adamawa State Water Board & ors. (2008) LPELR-1997(SC); Prince Atolagbe v. Alhaji Awuni (1997) 9 NWLR (Pt.522) 536; Captain Amadi v. NNPC (2000) 10 NWLR (pt. 674) 76;***

The provision of the above Nigeria Data Protection Regulation 2019 is clear as to how to proceed against a breach, it is not a mere irregularity that can be dispensed with. The arguments of the applicant as to statute of limitation are misconceived and irrelevant. Since the applicant/respondent has failed to comply with the provision of ***Section 4.1(8) of the NDPR***, this court is divest of jurisdiction to adjudge this matter. I so hold.

On the whole, I hold that this preliminary objection succeeds in its entirety and the Originating Summons of 28th August 2020 is hereby dismissed.

There is cost of 200,000 in favour of the respondent

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This is the Judgment of court delivered this 9th day of December, 2020 in the open court.

HON. JUSTICE IBRAHIM WATILA
JUDGE
9TH DECEMBER, 2020

Parties are absent.
Olumide Babalola Esq. for the applicant.

FEDERAL HIGH COURT
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DATE: 11/12/2020
ABEOKUTA

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ASABA JUDICIAL DIVISION
HOLDEN AT ASABA
ON TUESDAY THE 24TH DAY OF NOVEMBER, 2020
BEFORE HIS LORDSHIP, HON. JUSTICE (DR.) NNAMDI O. DIMGBA
JUDGE

SUIT NO: FHC/ASB/CS/140/2020

BETWEEN:

INCORPORATED TRUSTEES OF
DIGITAL RIGHT LAWYERS INITIATIVE .....APPLICANT
AND

COMMISSIONER OF POLICE, DELTA STATE.....RESPONDENT

JUDGMENT

By an Originating Motion dated and filed on 09/10/2020, the Applicant seeks the following reliefs:

1. *A DECLARATION that the arrest and detention of* ***Prince Nicholas Makolomi*** *by agents of the Respondent since the 5th day of October 2020 constitutes an interference with his fundamental right to personal liberty guaranteed under Section 35 of the Constitution of the Constitution of the Federal Republic of Nigeria, 1999.*
2. *AN ORDER releasing* ***Prince Nicholas Makolomi*** *conditionally or otherwise forthwith.*
3. *General damages in the sum of N10, 000,000 against the Respondent.*
4. *Consequential orders as this Honorable Court may deem fit to make in this circumstances.*

The above reliefs are sought on the following grounds:

1. *Prince Nicholas Makolomi is a music director resident in Ughelli, Delta State.*
2. *On the 5th day of October 2020, he was arrested by the agents of the Respondent in Asaba and detained up till the time of filing the suit.*
3. *It is suspected that he was detained on the account of a video he recorded on Special Anti Robbery Squad (SARS) Operatives leaving an injured citizen and fleeing with his car.*
4. *Section 35 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guarantees the right to personal liberty for all Nigerian citizens.*
5. *The Respondent has kept on detaining the Prince Nicholas Makolomi from that Monday till the time of filing the suit.*

In support is a Statement dated and filed on 09/10/2020. Also filed is an Affidavit of 8 paragraphs deposed to by **Maxwell Okobia** on 09/10/2020 wherein 3 (Three) exhibits were attached and marked as **Exhibits 1-3,** together with a Written Address dated and filed on 09/10/2020. In the Written Address, 2 (two) issues were formulated and argued as follows:

1. ***Whether or not by the interpretation and construction of Section 35 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the detention of***

the Prince Nicholas Makolomi by agents of the Respondent in the circumstances of this case constitutes an interference or likely interference with his fundamental right to personal liberty.

2. ***Whether or not the Applicant is entitled to reliefs sought.***

In reaction to the counter affidavit of the Respondent, the Applicant filed a Further Affidavit of 10 paragraphs deposed to by **Maxwell Okobia** on 06/11/2020. Also filed is a Reply on Points of Law dated 04/11/2020 but filed on 06/11/2020.

In reaction to the suit, the Respondent filed a Counter Affidavit of 12 paragraphs deposed to by **Insp. Felix Agu** on 27/10/2020 to which were annexed 3 exhibits marked as **Exhibits A-C.** Also filed is a Written Address dated and filed on 27/10/2020 wherein 2 (Two) issues were formulated and argued as follows:

1. ***Whether the Applicant has made out a case under the Fundamental Rights (Enforcement Procedure) Rules that will entitle him to the reliefs sought in this application.***
2. ***Whether the fundamental right application is a canopy or a shield exculpating one from criminal liability.***

The above represents the processes filed by the parties in this suit. Now, on 11/11/20 when the matter came up for hearing, **I.M. Okobia Esq.** for the Applicant and **F.N. Odunna Esq.** for

the Respondent, adopted their processes, adumbrated on same, and urged the Court to resolve the dispute in favour of the parties that they represent.

BACKGROUND FACTS

The Applicant claimed that one Prince Nicholas Makolomi (on whose behalf the suit was instituted), was arrested by the Respondent on the 5th day of October 2020 for allegedly video recording the Special Anti Robbery Squad Operatives leaving an injured citizen on the ground and fleeing with his car. The Applicant also claimed that since the arrest, the said Prince Nicholas Makolomi has been in the custody of the Respondent till the time of filing the suit and that the Respondent has refused to heed to their demand to release the said Prince Nicholas Makolomi and charge him before a competent court to determine his fate.

The Applicant has therefore, by this application, sought to enforce the right to personal liberty of Prince Nicholas Makolomi.

The Respondent on the other hand claimed that the arrest of Prince Nicholas Makolomi was based on a criminal report received by the Respondent against him and that he was transferred to the State CID Asaba from Ughelli whereupon he

was immediately charged to court after his statement was taken.

The parties are now before the Court to determine the true positions of things.

DETERMINATION OF SUIT

Although parties have formulated and argued a number of issues already identified above, I believe this single issue can conveniently resolve the dispute and accommodate all the arguments of the parties. The single issue which I propose and adopt is:

> *Whether in the circumstances of the present case, the Applicant has made out a sufficient case to be entitled to all or any of the relief(s) sought.*

In urging the Court to grant the reliefs, the learned counsel to the Applicant argued that the right to liberty requires that the arrest or detention of an individual must be in accordance with the law and that the continued detention of Prince Nicholas Makolomi from the 5th of October 2020 till the time of filing the action is a violation of his right to personal liberty as provided in Section 35 of the Constitution. Learned counsel also contends that given that the rules which govern fundamental right actions allows a person, either natural or artificial, to institute an action on behalf of another, the said Prince

Nicholas Makolomi is deserving of the reliefs sought in the application. Reliance was placed on the following authorities:

Oba Gabriel Orogie v. A.G Ondo State (1982) 3 NCLR, 349; Anibor v. EFCC (2017) LPELR- 43381 CA; A.G v. HRH Prince Ernest Augustus of Hanover (1957) AcC456; Gabriel Jim Jaja v. Comissioner of Police Rivers State& 2 Ors (2013) 6 NWLR (Pt.1350) Pg. 256.

In turn, the learned counsel to the Respondent argued that it is only when there is a proven breach that a court can be called upon to give judicial remedy and that in the circumstances of this case, the said Prince Nicholas Makolomi was neither arrested nor detained, and that the Applicant's intent in filing the suit is to use it as a shield to exculpate himself from criminal investigation and prosecution. Reliance was placed on the following authorities:

Chris Uba v. A.G Anambra State (2005) 15 NWLR (Pt. 747) Pg. 95; Ezeadukwa v. Maduka (1994) 8 NWLR (Pt. 518) Pg 634; Fajemirokun v. CB (CL) Nig ltd (2002) 10 NWLR (Pt. 744) Pg. 95 at 110.

The above represents the summary of the arguments and case of the parties in this suit. I have fully and carefully reflected and evaluated the different contentions.

The suit has been brought to enforce the fundamental human right of the Applicant, particularly, the Applicant's right to liberty. The test that this Court must follow in the effective determination of this suit is to assess the facts of the case in the light of the relevant provisions of the Constitution said to have been breached by the Respondent, taking into consideration the powers and duties of the police as contained in the *Police Act 2020*.

Now, *Section 35 of the 1999 Constitution*, to which reliance has been placed in this suit provides as follows:

> 1. *Every person shall be entitled to his right to liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law...(c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.*
>
> 4 *Any person who is arrested or detained in accordance with subsection (1)(c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be*

released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

5 In subsection (4) of this section, the expression a reasonable time means-

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and

(b) in any other case, a period of two days or such longer period as the circumstances may be considered by the court to be reasonable.

Section 4 of the Police Act which is also implicated in the suit provides as follows:-

"The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within and outside Nigeria as may be required of them by, or under the authority of this or any other Act.

On the sole allegation of unlawful detention, the Applicant's complaint is as contained in paragraphs 4 and 6 of the affidavit in support of the suit, where it was deposed as follows:

4. *On the 5th of October 2020, he was arrested by the agents of the Respondent in Asaba and detained up till the time of filing this suit. His arrest was widely*

reported by online media agencies. Pleaded and marked as exhibit 2 and 3 are some of the reports.

6. *I, in company of our lawyers, have approached the Respondent and its agent since Monday 5th of October 2020, to either charge the Applicant or release him on bail but they refused.*

The defence of the Respondent is as contained in paragraphs 4 and 5 of the counter affidavit of Insp. Felix Agu where he deposed as follows:

4. *That the case of defamation and cybercrime was reported against the Applicant in this suit by the Respondent via his agent Insp. Azuka Olunwaka attached to Operation Safe Delta. A copy of the statement of the complainant/respondent is herein annexed and marked as exhibit A for the court's perusal and guidance.*

5. *That the Operation Safe Delta operatives that arrested Nicholas Makolomi in Ughelli later transferred him to State CID Asaba for discreet investigation on the 8th day of October, 2020.*

Having read the affidavit evidence as well as the exhibits in this case, I am of the view that the subject of the application, Prince Nicholas Makolomi, was indeed arrested and detained for a period of at least 3 days before he was charged to court. I do not believe in the reliability of the counter affidavit of the Respondent. Looking at the tenor of the counter affidavit of the Respondent, it did not deny the fact that Prince Makolomi was arrested on the 5th day of October 2020. It merely stated

that he was transferred to the State CID Asaba for discreet investigation on the 8th of October, 2020 without stating the date when he was initially arrested, or refuting the claim in the supporting affidavit that the arrest occurred on the 5th of October, 2020. It was stated that the Applicant was "later" transferred from Ughelli where he was arrested to the State CID Asaba for discreet investigation. How long was the Applicant kept in the Respondent's detention facility at Ughelli where he was initially arrested and kept before he was later "transferred" to Asaba?

Even if I agree with the Respondent that the Applicant was arrested and transferred to Asaba on the 8th day of October and that he was charged to court on the same day, that is still a period of 3 days, meaning that the detention exceeded the period allowed by law. I have seen the charge sheet, Exhibit C, and note that same is undated. Was the Applicant charged to court on the same day he was transferred from Ughelli to Asaba?

All the materials before me considered, I believe that the subject, Prince Nicholas Makolomi's right to personal liberty was indeed violated by the Respondent having not charged the subject to court within a period of 1 day as provided by Section 35 of the Constitution since there is no contest that a court of

competent jurisdiction exists within Ughelli from where the subject was initially apprehended, nor was he released in the context of an administrative bail when it was clear the Respondent was not going to be able to charge the subject to court.

I agree that the Respondent in the exercise of their law enforcement powers can arrest and detain a suspect, but the suspect must be brought before a court of competent jurisdiction within one day where there is such a court within a radius of forty kilometres, and in any other case, within a period of two days or such longer period as the circumstances may be considered by the court to be reasonable. As I held in Suit No **FHC/ABJ/CS/1051/2015, MR. SUNDAY OGABA OBANDE & Anor v. MR. FATAI & 3 Ors**, delivered on 26/01/16, the requirement to release arrested suspects or charge them before a competent court promptly as required under Section 35(4) & (5) of the Constitution, in my view, is only a logical expression of the presumption of innocence which enures to their benefit and guaranteed by Section 36(5) of the Constitution. Indeed, it will appear that holding arrested suspects indefinitely at the will of law enforcement officials assumes their guilt, and is therefore a negation of that presumption of innocence which the Constitution has conferred on all citizens.

Additionally, the courts are the umpires and are far removed from the facts of a case. It will be unfair to expect the law enforcement agencies which apprehended a suspect and are quite biased regarding the circumstances of the apprehension, to be the very ones who will determine the entitlement or otherwise of the Applicant to his liberty. And that is why the Constitution requires that the person must not be detained for more than a day without being charged to court where a court exists within 40 kilometers radius or a period of not more than 48 hours where none exists within a radius of 40 kilometers.

The courts have also, in a plethora of authorities, frowned at the actions of the Respondent and other law enforcement agencies in arresting and detaining suspects so that they could continue their investigation in a bid to build a watertight case against them. See ***Waziri v. EFCC (2006) 3 FHCNLR p. 221 at 227; Jim-Jaja v. COP (2011) 2 NWLR (Part 1231) p. 375***.

On the basis of the above therefore, I hereby resolve the sole issue I had proposed in favour of the Applicant and enter judgment in favour of the Applicant in the following terms.

Relief 1 is hereby granted.

Relief 2 is refused, being spent and overtaken by events since the Applicant has already being charged to court and enjoys court bail as evident in Exhibit C.

Relief 3 is hereby granted but limited to the sum of 200,000.00 (Two Hundred Thousand Naira) only.

I make no order as to cost.

HON. JUSTICE (DR) NNAMDI O. DIMGBA
JUDGE
24/11/20

PARTIES: Absent.
APPEARANCES: **I.M. Okobia Esq.** for the Applicant.
F.N. Odunna Esq. for the Respondent.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON TUESDAY THE 30TH DAY OF JUNE 2020
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE N. E. MAHA
JUDGE

SUIT NO: FHC/ABJ/CS/56/2019

BETWEEN:

IN THE MATTER OF AN APPLICATION FOR BY THE INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE FOR THE ENFORCEMENT OF THEIR FUNDAMENTAL RIGHT TO FREEDOM OF EXPRESSION AND THE PRESS.

BETWEEN:

INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE **PLAINTIFF**
(Representing all its members, Associates and Partners)

FEDERAL HIGH COURT
10 JUL 2020
ABUJA

AND

NIGERIAN COMMUNICATIONS COMMISSION **DEFENDANT**

JUGDMENT

This Judgment concerns a fundamental right action filed by Incorporated Trustees of Digital Rights Lawyers Initiative, on behalf of its members, associates and partners against the Nigerian Communications Commission.

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The Nigerian Communications Commission on 5th October, 2018 published a Draft Code, on its Website titled "Establishment of Internet Industry Code of Practice" pursuant to the publication on its Website of the Draft Code, the Incorporated Trustees of Digital Rights Lawyers Initiative has alleged that 7.3 of the Draft Code is likely to infringe on its fundamental right of Freedom of Expression and Press under the 1999 Constitution (as amended), praying for these reliefs:

"1. *A declaration that section 7.3 of the Respondent's Establishment of Internet Industry Code of Practice on take down notice is likely to violate the Applicant's fundamental right to expression and the press guaranteed under section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*

2. *A declaration that the Respondent's plans to unilaterally issue takedown notice to any Internet Access Service Providers (IASP) without Court orders is likely to violate the Applicant's fundamental right to expression and the press guaranteed under section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*

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3. *Perpetual injunction restraining the Respondent, its officers and/or representatives from issuing takedown notices to Internet Service Providers (ISPS) without a Court order.*
4. *And such other order(s) as this honourable Court may deem fit to grant in the circumstance."*

Doubtless, jurisdiction defines the power of a Court to decide a matter in controversy and presupposes the existence of a duly constituted Court with control over the subject matter and the parties. Jurisdiction also defines the power of the Court to inquire into facts, apply the law, make decision and declare judgment. It is therefore a legal right which judges exercise authority. See *Tukur v. Governor of Gongola State* (1989) 4 NWLR (Pt.117) p. 517, *Adeyemi v. Opeyori* (1976) 6-10 SC and *A.G Federation v. Guardian Newspaper Ltd* (1999) 9 NWLR (Pt.618) 187.

For sake of clarity and to dispense with the use of the phrases "Applicant/Respondent" or "Respondent/Applicant", in this Judgment the Incorporated Trustees of Digital Rights Lawyers Initiative (is to be known as **"Plaintiff"** below) while the Nigerian Communications Commission (is to be known as the **"Defendant"** below).

In this suit, processes filed by parties are as follows:

Plaintiff:

(i) Application dated 15th January but filed on 18th January, 2019.

(ii) Plaintiffs reply on points of law to the Defendant's Counter Affidavit.

Defendant:

(i) Memorandum of conditional appearance dated 17th April, 2019.

(ii) Defendant's Counter-Affidavit dated and filed 15th May, 2019.

Apart from the highlighted processes, the Defendant filed a Notice of Preliminary Objection and Plaintiff in opposition filed a Written Address in opposition to the objection to Court's jurisdiction. The Defendant in objection to the Originating Summons, is seeking for these reliefs:

> "1. *An order of this honourable Court dismissing or in the alternative striking out this suit for lack of jurisdiction.*

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2. *Any Other or Further Orders that this Honourable court may deem necessary to make in the instances of this case."*

The grounds the objection is based on, is that:

"(i) The Applicant has no locus standi to maintain this suit.

(ii) The Applicant's application has not disclosed any cause of action against the Respondent.

(iii) The procedure adopted by the Applicant is unknown to or incompatible with fundamental right enforcement procedure.

(iv) The main claim(s) of the Applicant is not for the enforcement of fundamental rights or securing the enforcement thereof, but for judicial review of the action of the Respondent done pursuant to the exercise of its statutory powers.

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(v) The Applicant has not met the statutory conditions precedent to instituting an action against the Respondent as provided for under sections 86,87 and 88 of the Nigerian Communications Commission Act 2003, as such

it robs the Court of the jurisdiction to entertain this matter".

Arguing the objection, Learned Counsel to the Defendant Otu Etuk Esq., pointed out that the subject matter of this suit touches on a Draft Internet Industry Code of Practice published on its website (https://ncc.gov.ng/licensing-regulatory/legal/other-documents), and as such the Defendant has never threatened to invoke any of the provisions of the Draft Code against the Plaintiff. According to the Defendant, the issues raised by the Plaintiff in substantive suit are speculative and academic and that Courts of law do not adjudicate on speculative suits, referring the Court to **Exhibit 3** attached to the Affidavit in support of the Originating application of Plaintiff.

The lone issue presented by the Defendant, reads thus:

> ***"Whether this Honourable Court can assume or exercise jurisdiction to entertain the Applicant's notice of application dated January 15,2019, having regard to the fact that: (a) The Applicant has no locus standi to maintain this suit, (b) The Applicant has no action against the Respondent, (c) The enforcement of the Applicant's fundamental rights or security thereof is not the main***

claim of the Applicant against Respondent. In the alternative, (d) The Respondent shall argue that this Honourable Court lacks jurisdiction on the grounds that the Applicant has not met the statutory conditions precedent to instituting an action against the Respondent, as provided for under sections 86-88 of the Nigerian Communications Commission Act 2003".

Responding, the Plaintiff in his Written Address formulated three issues for Courts' determination and they read, thus:

"(a) Whether or not the Respondent is right to have introduced section 1(3) of the Constitution which is not part of the Applicant's case?

(b) Whether or not this suit is for judicial review under sections 86-88 of the Nigerian Communications Act 2003 (NCA).

(c) Whether or not the Applicant has locus standi to maintain this suit?"

I note the above issues formulated by Learned Counsel to the parties in the matter as well as authorities cited in the written submission of Counsel to the parties.

Evidently, the issues distilled by Learned Counsel to the parties are differently worded, however, it is my view that in considering the matter, the issues below subsume with clarity all the issues formulated by the parties. They are:-

1. **Whether the Plaintiff has the *locus standi* to institute this suit.**
2. **Whether the Plaintiff has disclosed the cause of action against the Defendant for the Court to adjudicate on, having regards to the subject matter of this suit.**
3. **Having regards to sections 86, 87 and 88 of the Nigerian Communications Commission Act 2003, if the Court has the jurisdiction to entertain the action.**

On the issue one: Defendant contends that the Plaintiff lacks the *locus standi* to commence this suit based on the Draft Code published on its website *vis-à-vis* the reliefs sought in this suit and that Plaintiff has neither claimed, alleged nor shown how the Defendant has threatened its right to Freedom of Expression and Press and that, the suit is speculative and robs the Court of

jurisdiction to adjudicate on the matter, calling in aid *A.G. Anambra State v. A.G. Federation* (2005) 9 NWLR (Pt.931) 572. where the Supreme Court held that:

> ***"...Only a person who is in imminent danger of coming into conflict with the law or whose business or other activities have been directly interfered with by or under a law, has sufficient interests to sustain a claim..."***

On the other hand, Plaintiff submits that it is incorrect to suggest that it lacks *locus standi* calling in aid *Dilly v. Inspector General of Police* (2016) LPELR- 41452 (CA) and *Olumide Babalola v. Attorney General of the Federation (2018) LPELR-43808 CA* where the Court of Appeal held thus:

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> " ***...the issue of standing to sue was widened by the Supreme Court in Fawehinmi v. Akilu (supra) in 1987 after Adesanya's case was decided in 1981 that "it is the universal concept that all human beings are brothers assets to one another" especially in this counting where the socio-cultural concept of family includes nuclear family or extended family which transcends all barrier to paraphrase Eso, JSC in Fawehinmi v. Akilu (supra) where it was held that the requirement of locus***

standi becomes unnecessary in constitutional issues as it merely impedes on judicial function. To demonstrate that public spirited litigation in fundamental rights related cases is now the norm, the FREPR 2009 made pursuant to Section 46(3) of the 1999 Constitution and thus clothed with constitutional force expanded the horizon of locus standi in fundamental rights cases in paragraph 3(e) thereof thus- "3(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any nongovernmental organizations, may institute human rights application on behalf of any potential applicant..."

Premised on the above, it is the contention of Plaintiff that it has the requisite standing to institute this matter.

Let me start by saying that indeed the issue of standing to sue was widened in *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt. 67) 797, where the Court held:

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10/7/2020

"... since we are all brothers in the society, we are our brother's keepers. If we pause a little and cast our minds to the happenings in the world, the rationale to the Rule will become apparent. See Ogbe v. Okonkwo & Ors (2018) LPELR-43876 (CA)..."

Section 3 (e) in preamble of the Fundamental Right (Enforcement Procedure) Rules 2009 allows public interest litigation. In *Omonyahuy & Ors. v. IGP* (2015) LPELR-25581, the Court of Appeal held that preambles are important and are used as aid to the construction of a statute.

Locus standi is a condition precedent to instituting a suit. It is a legal voice with which the Plaintiff amplifies his legal rights above those of ordinary men. The issue of *locus standi* constitutes a condition precedent to the institution of any action before a Court of law and whenever the issue of *locus standi* is raised it behoves on a Court of law to determine it first before going into the merit of the case.

I have deeply considered the objection *vis-à-vis* the reliefs sought and the grounds in which the reliefs are sought and it is sufficient to say that it will be against the spirit of section 46(2) of the 1999 Constitution and section 3(e) of the preamble to the

Fundamental Right (Enforcement Procedure) Rules 2009 to hold that the Plaintiff lacks *locus standi*. This is fortified by *Registered Trustees of Faith Tabernacle Congregation and Ors v. Ikwechal* (2001) 1 CHR 423,42 and *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (2019) 5 NWLR 519 where the Supreme Court held thus:

> ***"in the determination of the question whether a Plaintiff has standing to request adjudication upon an issue, the Court has identified two things or factors to bear in mind; that is – (a) Locus standi should be broadly determined with due regard to the corporate interest being sought to be protected bearing in mind who the Plaintiff is or Plaintiffs are; and (b) Ready access to the Court is one of the attributes of civilised legal system. It is dangerous to limit the opportunity for one to canvass his case by rigid adherence to the ubiquitous principle inherent in locus standi which is whether a person has the stand in a case. The society is becoming highly dynamic and certain stands of yester years may no longer stand***

in the present state of social and political development."

As rightly submitted by Plaintiff, public interest litigation are allowed in Fundamental Right actions and gives unrestricted access to human rights activist, advocates or groups as well as non-governmental organisation to institute such actions.

Additionally, nothing in the Affidavit of the Defendant disproves the fact that the Plaintiff is a Non-Governmental Organisation registered to fight the course of protection of Digital Rights and Freedom of Expression and the Press. This issue is hereby resolved against the Defendant.

On issue two:

The question on whether the Plaintiff has disclosed the cause of action to enable the Court adjudicate on the dispute between the parties. It is therefore necessary at this stage to turn to the averments on the Affidavit in support of the Originating Summons. It was averred that Defendant drafted a document titled "Establishment of Internet Industry Code of Practice", and meant to govern internet industry as well as regulate the use of internet and that the Applicant believes that enforcement of the provision of **Exhibit 3** would likely infringe on the Applicant's right to Freedom of Expression and the Press.

To this suit, the primary complaint of the Plaintiff touches on the Draft Code attached to the Originating Summons, alleging that the Draft Code is likely to breach its fundamental right to expression and press.

Learned Counsel to the Defendant submitted that there is no real dispute or cause of action against the Defendant and that this suit is vague, hypothetical, academic, speculative, calling in aid *Adesokun v. Adegboruwa* (1997) 3 NWLR (Pt.493), *A.G Federation v. A.G Abia State* (2001) 11 NWLR (Pt. 725) 689, *Egbe v. Adefarasin* (1987) 1 NWLR (Pt.4) and *Abubakar v. B.O & A.P Ltd* (2007) 18 NWLR (Pt. 1066) 319. He urged the Court to dismiss or strike out the suit.

Responding, Learned Counsel to the Plaintiff submits that once there is a threatened breach of fundamental right, a cause of action arises, calling in aid *Umoren v. Udokpong* (2019) LPELR (CA) and the deposition in paragraphs 5,9,10,11,12 and 13 of the Affidavit in support of the Application.

I have considered the evidence in support of the Plaintiff's application and submissions of parties on issue two. For avoidance of doubt, **Exhibit 3** is a Draft Code and no evidence before the Court that the Draft Code has been passed into law or gazetted at the time of filing this suit. This is fortified by the

averments in the affidavit in support of the Originating Summons which are speculative and appears not suitable for adjudication.

I turn to *Nworika v. Ononezemadu* (2019) LPELR-46521 where the Court held, thus:

> ***"the judiciary must insulate and protect itself and the society from the impatience of litigants who seek judicial orders at all cost. The rule of law must be upheld at all times and only when proper procedures are observed and upheld can the rule of law subsist." I find it relatively easier to resolve this issue against the Appellant on his admission of filing this suit speculatively, as contained at page 16 the Appellant Brief of Argument. What more do I say than to further amplify the 'decent burial' the lower Court had given the speculative misadventure of the Appellant... to the extent that the Appellant's cause of action at the time of filing the suit was anticipatory or speculative, no Court of law would countenance the suit. Furthermore, this suit lacks all essential ingredients for the purpose of conferring jurisdictional competence in the Court to hear and determine the suit as***

laid down in Madukolu v. Nkemdilim (1962) 2 SCLR, 341. This position of the law has long been settled in this case as to the principles which must be satisfied before the Court can competently entertain a suit: (a) The Court is properly constituted as regards members and qualification of the members of the bench, such that no member is disqualified for one reason or the other; (b) The subject matter of the case is within its jurisdiction, and there is no feature in the case, which prevents the Court from exercising jurisdiction; and (c) The case comes before the Court by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction..."

Having regards to the above, I have turned to the pleading of Plaintiff wherein it was admitted that the Internet Industry Code of Practice is meant to govern Internet Industry and regulate the use of internet and that it believes that **Exhibit 3** would likely infringe on the Applicant's right to Freedom of Expression and the Press. Defendant submits that there is no dispute between parties and that this suit is speculative. I find therefore that submissions of the Defendant's Counsel on this issue,

unassailable. The reason is simple. When we speak of "cause of action," we mean the factual base or a factual situation or combination of facts which gives rise to sue, it consists of two elements - the wrongful act of the Defendant which gives the Plaintiff the cause of complaint and consequential damages. See *Savage & Ors v. Uwechia* (1972) 1 All NLR 251; *Tukur v. Govt of Gongola State* (1989) 4 NWLR (Pt 117) 717; *Ibrahim v. Osim* (1988) 3 NWLR (Pt. 82) 257; *Thomas v. Olufosoye* (1986) 3 NWLR (Pt. 18) 669, 682; *Amede v. UBA* (2008) 8 NWLR (Pt.1090) 623. Furthermore, it means the factual situation which gives a person a right to a judicial relief. See *Egbe v. Adefarasin* (1987) 1 NWLR (Pt. 47) 1; *Yusufu v. Co-operative Bank Ltd* (1994) 7 NWLR (Pt. 359) 676; *LUTHMB v. Adewole* (1998) 5 NWLR (Pt. 550) 406.

It is not in doubt that Plaintiff reacted to a Draft Code that was not gazetted or formally passed into law at the time of filing this suit. See **Exhibit 3** attached to the Originating Summons. What is to be made clear to parties is that, a Court cannot speculate. See *American Cyanamid v. Vitality Pharmaceuticals* (1991) 2 NWLR (Pt. 171) 15.

In effect, I find and hold that this suit is speculative, frivolous and an abuse of the judicial process. It also behoves on a party instituting an action to rely on a subsidiary legislation or an

instrument that has the force of law to invoke the powers of adjudication of the Court. "Adjudication" is defined in *Black's law dictionary (Ninth Edition)* at Pg. 47 thus: *"to rule upon judicially"*. I can satisfactorily say that this suit lacks all essential ingredients to confer jurisdictional competence on this Court to rule upon judicially. Furthermore, the averment in the Affidavit are speculative in nature and discloses no cause of action. See *Agbakoba v. INEC* (2003) 18 NWLR (Pt.119), *Plateau State v. A.G Federation* (2006) 3 NWLR. I therefore, find and hold that the Originating Summons do not disclose any cause of action against the Defendant in the case at hand.

Having come to the above conclusion, it is my view that this Court lacks jurisdiction. It is my further view that consideration of other issues in this suit will become a mere academic exercise which the Courts do not usually indulge in and I so decline to do. Consequently, this matter is struck out. I make no order on costs.

This shall be the Judgment of this Court which was rescheduled till today the 30th day of June 2020 due to the Corona virus pandemic in Nigeria.

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Hon. Justice N.E Maha
Judge

Coram:

Parties: Defendant represented by the Manager and Head of Legal Division of the Nigerian Communication Commission).

Appearance:

Olivia Audu Esq., for the Plaintiff.

Amaitem Ita Etuk Esq., for the Defendant.

Hon. Justice N. E. Maha
Judge
30/06/2020

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON TUESDAY THE 26TH DAY OF JANUARY, 2021
BEFORE HIS LORDSHIP, THE HONOURABLE
JUSTICE J.O. ABDULMALIK
JUDGE

SUIT NO: FHC/IB/CS/98/2020

BETWEEN:

INCORPORATED TRUSTEES OF DIGITAL
LAWYER INITIATIVE .....APPLICANT

AND

NATIONAL YOUTH SERVICE CORPS.....RESPONDENT

JUDGMENT

By way of an Originating Summons for the Enforcement of 2020 Batch C Stream 1 Corp Members Fundamental Right to private and family life, dated 16th day of October 2020 and filed 26th day of October 2020, the Applicant seeks as follows:-

1. *A DECLARATION that by virtue of articles 1.1(a), 2.2, & 2.3 of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is enunciated under right to privacy covered by*

section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

2. A DECLARATION that the Respondent's processing of the images and other personal data of 2020 NYSC Corp members in an End of the Year Service Magazine/ Photo album constitutes a violation of section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and Article 2.1(a) of the Nigeria Data Protection Regulation 2019.

3. A DECLARATION that the Respondent's "Data Subject Consent Statement" attached as a condition for Discharge Certificate does not qualify as freely-given consent required under Article 1.3(iii) of the Nigeria Data Protection Regulation 2019.

4. PERPETUAL INJUNCTION restraining the Respondent and/ or its agents from further processing NYSC Corp Members' personal data End of the Year Service Magazine/Photo album without a lawful basis.

5. CONSEQUENTIAL ORDER(S) as this honourable court may deem fit to make in the circumstance.

Annexed to the Originating Summons is a statement of the applicant, which sets out the name of the Applicant, the description of Applicant, the reliefs sought and the grounds upon which the reliefs are sought.

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grounds are as follows:

i. The Applicant is a civil society organisation which is committed to the enforcement and promotion of digital rights in Nigeria.

ii. Regulation 4.1(8) of the Nigeria Data Protection Regulation 2019 gives the Applicant the right to ensure compliance with the Nigeria Data Protection Regulation 2019.

iii. Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guarantees the right to freedom of privacy and family life.

iv. The Respondent has coerced 2020 Corp members most recently Batch C Stream 1, to sign data subject consent forms without legal basis as the forms are a pre-condition for discharge in Oyo State and other parts of Nigeria.

v. The personal data collected from Corp members are subsequently processed to print magazines which bear the names, phone numbers, image photographs and other personal data of Corp members and which are subsequently exposed all over Nigeria.

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The Respondent's act of processing personal data without legal basis violates and/or is likely to violate the right to privacy and family life guaranteed under the Constitution and articles 1.1(a), 2.2, & 2.3 of the Nigeria Data Protection Regulation 2019.

vii. The Respondent is likely to share personal data with third parties for purposes unknown to the Applicant's members;

viii. The Respondent is likely to compromise the personal data in their possession.

In support of the Originating Summons is a seventeen paragraphed affidavit, filed along with five exhibits, to wit, Exhibit **1** - Applicant's Certificate of Incorporation, Exhibit **2** – A copy of the Data Consent Form, Exhibit **3** – Respondent's Magazine, Exhibit **4** – A copy of Social Media Post by some Corp members, and Exhibit 5-A copy of NDPR. The gist of the Applicant's suit are enumerated in the Applicant's affidavit in support. Of specific reference are paragraphs **4** to **16** thereof. It reads:-

"4. The Applicant is a civil society organisation registered Companies and Allied Matters Act with the objectives of promoting and under the protecting digital rights of citizens which includes online expressions, internet-based communication, data protection and activities. Pleaded and marked "Exhibit 1" is the certificate of Incorporation.

The Applicant is an association of freedom fighters with volunteer members in all the 36 states of the federation and the Federal Capital Territory.

6. The Respondent is a creation of law tasked with the objective of developing in the Nigerian youths the attitudes of mind, acquired through shared experience and suitable training, which will make them more amenable to mobilisation in the national interest, among others.

7. In October 2020, the Respondent mandated 2020 Corp members, most recently Batch C Stream 1, especially in Ibadan Oyo State, to sign data consent forms before the can be issued their discharge certificates. Pleaded and marked "Exhibit 2" is a copy of the said form.

8. I know for a fact that Corp members nation-wide have been (and/or are being) coerced by the Respondent to sign the form as their consent as a condition for receiving discharge certificates.

9. The personal data collected from Corp members are subsequently processed to print magazines/year books/photo albums (without Corp members' consent) which bear the names, phone numbers, image photographs and other personal data of Corp members. Pleaded and marked "Exhibit 3" is a copy of the Respondent's magazine.

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I know for a fact that the Consent Form was made a condition precedent by the Respondent before Corp members are allowed to obtain their certificate of discharge.

11. Corp members all over the country have complained about this worrisome development especially since they were extorted the sum of ₦1,200 for a copy. Pleaded and marked "Exhibit 4" is a copy of social media posts by some Corp members.

12. I know that, at the inception of corp members' service year, they were neither informed nor their consent sought for the processing of their personal data in the form of magazines and/or end of the year Albums.

13. I know for a fact that the NDPR requires data controllers to only process personal data for specific purpose(s).

14. I know for a fact that the exposure of personal data belonging to these Corp members by the Respondent to the public constitutes a grave risk as the Corp members are likely to be potential targets of identity theft, cyber stalking, illegal data mining, online bullying, breach of privacy and similar dangers.

15. I know for a fact that Regulation 4.1(8) of the Nigeria Data Protection Regulation 2019 gives right to the Applicant to ensure compliance with the Nigeria Data Protection Regulation 2019. Pleaded and marked Exhibit 5 18 a copy of the Nigerian Data Protection Regulation (NDPR).

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6. I believe that the Respondent's processing of data Corp members data without legal basis is likely to interfere with their fundamental rights to private and family life under section 37 of the 1999 constitution for the following reasons:

i. The Respondent has no legal basis to process the personal data of the Applicant in such manner.

ii. The Respondent cannot coerce consent from Corp members to share their personal data with the public.

iii. Consent obtained from Corp members is not freely given as it is made a pre-condition for discharge certificate.

iv. The consent forms were even printed and signed on the day of discharge after the magazines have already been printed.

v. The Respondent has not stated the time frame for storing the personal data of Corp members.

vi. The Respondent is likely to use the personal data in a manner that will interfere with the in Applicant's right to privacy.

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vii. *The Respondent is likely to share personal data with third parties for purposes unknown to the Applicant's members.*

viii. *The Respondent is likely to Compromise the personal data in their possession.*

ix. *The readers of the magazines, all across Nigeria, may use the personal data for identity theft and other untoward activities".*

The learned counsel for applicant formulated two issues for court's consideration-:

ISSUE ONE

i. *Whether or not by the interpretation of section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and articles 1.1(a), 2.1(a) 2.2, & 2.3 of the Nigeria Data Protection Regulation 2019, the Respondent's processing of NYSC Corp members' personal data in an End of the Year Service Magazine/ Photo album without their freely given consent constitutes a violation of the Corp members' right to privacy?*

He placed reliance on a plethora of European cases in aid of his contention that the Respondent's act of processing personal data is legally baseless and is a violation of the Applicant's

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fundamental rights to privacy of citizens enshrined under section 37 of the **Constitution Federal Republic of Nigeria 1999**. He cited the case of **FRN V Daniel (2011) LPELR-4152 (CA)**. Learned counsel urged Court to resolve this issue in favour of the Applicant and hold that data protection as provided under the Nigeria Data Protection Regulation (NDPR) 2019, forms a component of right to private and family life as guaranteed under **Section 37** of the **Constitution Federal Republic of Nigeria 1999 (as amended)**.

ISSUE TWO

ii. *Whether or not by the interpretation of Article 1.3(iii) of the Nigeria Data Protection Regulation 2019, the Respondent's "Data Subject Consent Statement" attached as a condition for Discharge Certificate qualifies as freely-given consent?*

He submits that the consent form circulated to obtain Corp members consent does not qualify as freely given consent. He argued that since the respondent only sought the consent as a pre condition for passing out and receipt of discharge certificate, such consent cannot amount to a freely given consent under the NDPR and Constitution. He contends that the year book serves no legitimate purpose than to extort ₦1,200. From Corp members before they are allowed to graduate. He urged court to resolve issue two in favour of Applicant.

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In contra position to the above application, the learned counsel to Respondent relied on a five paragraph counter affidavit deposed to by Olatoye Christy, an Assistant Director and Head of Public Relations in Respondent's State Secretariat, Agodi Gate, Ibadan, Oyo State. The facts of respondent's rebuttal are contained in Paragraphs 3(f -t) of Respondent's counter affidavit. The particular averments are set out thus:-

'3f. That in compliance with the provisions of the Nigeria Data Protection Regulation 2019, the Respondent processes personal data only with the consent of the Data Subject. A copy of the Data Subject Consent Statement is attached to the Applicant's affidavit in support of its application as Exhibit '2'.

g. That purported 2020 Batch C Stream I corps members whose fundamental rights the Applicant seeks to enforce never existed at any point in the service of the Respondent. The latest Batch of corps members the Respondent called-up for National Service is 2020 Batch 'B' and their service year commenced on the 10th day of November, 2020 with Orientation Course.

h. That the 2019 Batch 'C' Stream 1 ex-corps members and every other Data Subject whose personal data is processed by the Respondent duly, voluntarily and willingly gave their prior individual consent to the processing of their data by the Respondent for specific purposes, and the consent could be withdrawn at any time by using the Data Subject Withdrawal

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i. That the consent given by the 2019 Batch 'C' Stream 1 ex-corps members and indeed all other Data Subjects is not connected to and is not a condition for the issuance of Certificate of National Service by the Respondent to deserving ex-corps members of the 2019 Batch 'C' Stream 1 or any other Batch of corps members.

j. That some of the specific purposes for which the personal data of the 2019 Batch 'C' Stream 1 ex-corps members and other Data Subjects has been processed by the Respondent are the preparation of the End of Service Year Magazine, research, statistics and promotional activities. Copies of the End of Service Year Magazine for Oyo State and Lagos State Secretariats of the Respondent are attached to the Applicant's affidavit in support of its application as Exhibit '3'.

k. That the End of Service Year Magazine is produced to consolidate on Respondent's objective of building of common ties among the Nigerian youths and to connect ex-corps members among themselves but the Magazine is not a condition for issuance of Certificate of National Service by the Respondent to deserving ex-corps members of the 2019 Batch 'C' Stream 1 or any Batch of corps members and no ex-corps member, let alone the 2019 Batch 'C' Stream 1 ex-corps members, is extorted of any money to obtain the Magazine.

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That the Respondent has a legal basis and legitimate interest for processing the personal data and information in its custody or possession and the processing of the information did not constitute any risk to the 2019 Batch 'C' Stream 1 ex-corps members or any Batch of corps member or any Data Subject neither does it in any way interfere with their fundamental rights to private and family life.

m. In processing the personal data in the custody or possession of the Respondent for the End of Service Year Magazine and any other specific purpose, the Respondent complied with the provisions of the Nigeria Data Protection Regulation, 2019 and all other related laws.

n. That no corps member or ex-corps member, let alone the 2019 Batch 'C' Stream 1ex-corps members, has ever complained against signing the Data Subject Consent Statement or against obtaining the End of Service Year Magazine from the Respondent.

o. That the Applicant's allegation of coercion of corps members Nationwide by the Respondent to sign the Data Subject Consent Statement and the allegation of extortion of money from the corps members all over the country by the Respondent for the End of Service Year Magazine is not correct.

p. That any person who is aggrieved by any decision or exercise of any power by the Respondent is to appeal to the Presidency in the

st instance before any action may be commenced in any Court in Nigeria.

q. That the subject matter of this suit is the alleged coercion of 2020 Batch 'C' Stream I corps members by the Respondent to Sign the Data Subject Consent Statement and the alleged processing of personal data of 2020 Batch 'C' Stream I corps members by the Respondent for the End of Service Year Magazine without legal basis.

r. That the Applicant is aggrieved by the Respondent's alleged actions in sub-paragraph (q) above.

s. That the Applicant did not appeal to the Presidency in the first instance in respect of its grievance before it instituted this suit against the Respondent.

t. That the law that established the Respondent makes the appeal to the Presidency mandatory and a condition-precedent for the Applicant to fulfil before proceeding to Court against the Respondent, but the Applicant did not fulfil the condition-precedent before this action was instituted."

In aid of Court's evaluation of this suit, learned counsel for Respondent raised four issues thus:-

ISSUE ONE:

i. *Whether, in view of the provisions of Section 20 of the National Youth Service Corps Act, Cap N84, Laws of the*

Federation of Nigeria, 2004, the Court's jurisdiction has crystallised to entertain this suit against the Respondents.

Learned counsel drew court's attention to the processes filed by the Applicant in aid of his submission that the Applicant's suit is premature and same have sapped the jurisdiction of this Honourable Court to entertain this suit. He relied on **Section 20** of the **National Youth Service Corps Act (NYSC).** He argued that there is nothing to evidence that an appeal to the presidency was made to err their grievance, a condition precedent before the institution of this suit. He maintained that the condition precedent is mandatory as such, Applicant's omission thereof is fatal to its suit. He cited the case of **Adesanoye v Adewale (2006) 10 MJSC 1 @ 15, paras. E-F.** He urged court to resolve issue one in favour of the Respondent.

ISSUE TWO:

ii. *Whether in view of the provisions of Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), this suit as presently constituted is brought for and on behalf of a legal personality and is known to law.*

Learned counsel argued that while cases of fundamental rights can be instituted on behalf of aggrieved persons, however the **Fundamental Rights (Enforcement Procedure) Rules 2009,** does not guarantee the institution of cases for non existent persons. He contends that the Exhibit 3, being a copy of

Respondent's magazine which depicts 2020 Batch C does not exist, as the latest Batch of Corp members the Respondent called up for National service is 2020 Batch B, whose service year commenced 10th day of November 2020. He urged Court to resolve issue two in favour of Respondent.

ISSUE THREE:

iii. Whether there is a reasonable cause of action in this suit.

Learned counsel contends that even assuming this suit was instituted on behalf of 2020 Batch C Stream 1ex Corp members, that the Exhibit **2,** that is, the consent form, do not expose or imply that the Corps members are extorted of money and that the ex Corp members voluntarily gave their individual consent and that there is nothing to suggest otherwise. He insisted that the applicant have not exhibited the words of coercion that amounts to a breach of the ex Corp members fundamental rights of privacy.

ISSUE FOUR

iv. Whether the Applicant is entitled to the grant of the reliefs sought from the Honourable Court

He submits in the negative and stated that the Applicant failed to show he has *prima facie* case of claim, he reiterated that the Applicant's suit is premature. He urged Court to dismiss this suit

for want of maturity, competence and jurisdiction with substantial cost.

In reply, the Applicant relied on a fourteen paragraphed affidavit. He attached four exhibits, to wit, a Newspaper publication- Exhibit **C1,** the consent form- Exhibit **C2,** a computer generated evidence tweet on the payments- Exhibit **C3,** computer generated print out of complaint -**C4**and Exhibit**C5** are evidence that Respondent charged ₦1,500 for the magazine. In paragraph 5 of the further affidavit, learned counsel relied on the averments that the actual Corp members intended to mention in this case are the 2019, Batch B Stream 1 Corp members. He further expanded his submission and urged court to grant the reliefs sought.

RESOLUTION

By way of a preface, it pertinent to state that, paragraph 8(c) of the Preamble to the **Fundamental Rights (Enforcement Procedure) Rules 2009,** reads as follows

"The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights, advocates or groups as well as any non - governmental organisations, may institute human rights applications on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

i. *Anyone acting in his own interest*
ii. *Anyone acting on behalf of another*
iii. *Anyone acting as a member of, or in the interest of a group or class of persons.*
iv. *Anyone acting in public interest*
v. *Association acting in the interest of its members or other individuals or groups.*

Predicated on the above, the Applicant has instituted this suit on behalf of 2019 Batch C Corp members of the Respondent.

ISSUE ONE: *Whether or not by the interpretation of section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and articles 1.1(a), 2.1(a) 2.2, & 2.3 of the Nigeria Data Protection Regulation 2019, the Respondent's processing of NYSC Corp members' personal data in an End of the Year Service Magazine/Photo album without their freely given consent constitutes a violation of the Corp members' right to privacy?*

Section 37 of the **Constitution Federal Republic of Nigeria 1999 (as amended)** provides:-

"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

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There is no gain said that Fundamental rights are constitutionally guaranteed, and protected with a specific provision preserving same as specified in the Constitution, which provides that, in case of a breach of that right, the person aggrieved can approach the High Court for redress. See **Section 46(1) Constitution Federal Republic of Nigeria 1999 (as amended).** However, it must be said that these fundamental rights entrenched in Chapter Four of the **Constitution** are not always absolute in so far as they co-exist with other validly made laws.

It apt to settle the preliminary issue of jurisdiction raised by learned counsel of Respondent in his submission in opposition to this suit. In the case of **UBA V Johnson (2018) LPELR-45073 (CA)** the Court of Appeal held as follows:

"Flowing from all that has been said above, and as it is glaring that it is not the intendment of the FREP Rules that the enforcement by a person of his fundamental right is to be subjected to the fulfilment of any condition precedent whatsoever, once the proceeding is initiated by a process accepted by the trial Court, it becomes obvious that Appellants' issue 5 must be and is hereby resolved against them."

In that wise I hold that **Section 20** of the **National Youth Service Corp Act, Cap N84, LFN, 2004** cannot divest this Court of the jurisdiction to entertain this suit. **Section 20** of the

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National Youth Service Corp Act, Cap N84, LFN, 2004 reads thus:-

"20. Notwithstanding the provisions of section 19 of this Act any person aggrieved by any decision of the Directorate or by the exercise by the Directorate of any power under this Act shall have the right of appeal to the Presidency in the first instance and the Presidency may, notwithstanding anything to the contrary in this Act and subject to the approval of the National Defence and Security Council confirm or reverse the decision of the Directorate or take such further measures in relation to the appeal as he may think just before any action may be commenced in any court of law in Nigeria."

Therefore, I find safe to emphatically state that this Court has the requisite jurisdiction to determine this suit. I answer this issue in favour of the Applicant.

Pursuant to the evidence furnished by learned counsel for the Respondent, that the right to absolute privacy could be held to have circumscribed by Exhibit **2,** that is, the DATA SUBJECT CONSENT STATEMENT FORM, it apt to carefully study this Exhibit **2** in its entirety because I find that it is the precursor to the resolution of this case. Yes, this is my firm view, because the

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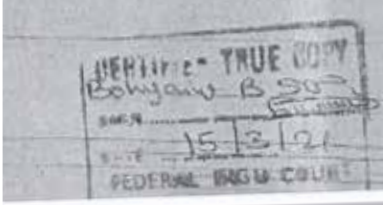
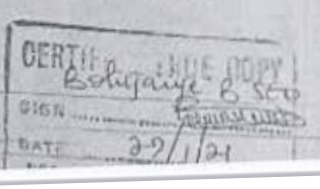
Exhibit 2 precedes the publication of Exhibit 3, that is the Respondent magazine. This is my position, because, the learned counsel for Applicant failed to evidence that the magazine publication precedes the Exhibit 2. He could have discharged this onus of proof by exhibiting the copies of the actual consent forms filled by the 2019 Batch B Stream 1 Corp members, and a dated copy of the Respondent's magazine, so as to depreciate the averments contained in the Respondent's counter affidavit. But rather the learned counsel for Applicant exhibited an unfilled Exhibit 2. Since the Exhibit 2 is unfilled, it will not be difficult to construe the said document.

A look at the Exhibit 2 not only reveals a consent form, but it also contains a leeway for the 2019 Batch B Stream 1 Corp members to waive their consent at any time, by the use of the DATA SUBJECT WITHDRAWAL FORM. It is quite elementary that Affidavit evidence is in law evidence, just as viva voce evidence See **Nwosu v. Imo State Environmental Sanitation Authority (1990) 12 NWLR (Pt. 135) 688.**Therefore, where documents speak for themselves, I find that the evidence elicited from the document cannot be altered, countered nor be added to, by oral evidence or mere deposition in an affidavit evidence not backed by documentary evidence. See **Ibrahim v Mohammed (2018) LPELR- 47139 (CA).**





In the instance of this case, I hold squarely that the Exhibit **2** is not an infringement of Applicant fundamental rights encapsulated in **Section 37** of the **Constitution Federal Republic of Nigeria 1999 (as amended),** and the Exhibit **2** have not exposed at all that the applicant were railroaded into a straitjacket all for the sake of their graduation/passing out certificate. And of course apart from the clear import of the Exhibit **2,** there is also the provisions of **Section 20** of the **National Youth Service Corp Act, Cap N84, LFN, 2004**, it reads thus:-

"20. Notwithstanding the provisions of section 19 of this Act any person aggrieved by any decision of the Directorate or by the exercise by the Directorate of any power under this Act shall have the right of appeal to the Presidency in the first instance and the Presidency may, notwithstanding anything to the contrary in this Act and subject to the approval of the National Defence and Security Council confirm or reverse the decision of the Directorate or take such further measures in relation to the appeal as he may think just before any action may be commenced in any court of law in Nigeria."

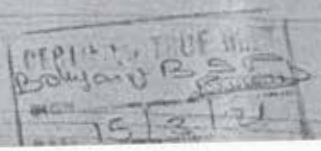
The Applicant further had another channel to ensure their that their fundamental rights were not violated, by virtue of the right of appeal, should the need arises. In all, I resolve this issue in favour of the Respondent.

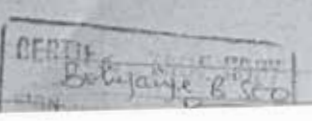
ISSUE TWO : *Whether or not by the interpretation of Article 1.3(iii) of the Nigeria Data Protection Regulation 2019, the Respondent's "Data Subject Consent Statement" attached as a condition for Discharge Certificate qualifies as freely-given consent?*

Pointedly I find that Exhibit **2** annexed to the Originating Summons have fully complied with the **Nigeria Data Protection Regulation 2019.** And crucial to set out is **Article 2.3(2)(C)** to wit:-

"prior to giving consent, the Data Subject shall be informed of his right and method to withdraw his consent at any given time. However, the withdrawal shall not affect the lawfulness of processing based on the consent before its withdrawal".

It is trite in law that he who asserts must prove. See **Okigbo v Okigbo & Ors (2014) LPELR -23413 (CA).** Flowingly, I find that a couple of tweets messages evidenced in Exhibit **C4** cannot devalue the cogent evidence of Exhibit **2.** The Exhibit **C4** smacks of hearsay evidence which is not admissible in Court. I hereby discountenance Exhibit **C4.** Assuming the applicant had exhibited a fully documented acknowledged complaint by the Respondent, that piece of evidence would most definitely have suffice to make this case preponderate in favour of Applicant.





Needless to say, the Applicant have failed to do so. The learned counsel for Applicant have to be fully aware that the workings of the Court only allows for hard and cogent facts, and it is not stirred up, as in a media trial. I answer this issue in favour of the Respondent.

Conclusively, I hereby adjudge this suit in favour of the Respondent, and I forthwith dismiss this suit in its entirety. I also award cost of ₦100,000 in favour of the Respondent.

.....

HON. JUSTICE J .O. ABDULMALIK
(PRESIDING JUDGE)
26/1/2021

Parties: Absent.

Appearance: O. P. Omuru Esquire for Respondent.

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE AWKA JUDICIAL DIVISION
HOLDEN AT AWKA
ON TUESDAY THE 2ND DAY OF NOVEMBER, 2021
BEFORE HIS LORDSHIP, HON. JUSTICE N.O.DIMGBA
JUDGE

SUIT NO: FHC/AWK/CS/116/2020

BETWEEN:

1. INCORPORATED TRUSTEES OF DIGITAL RIGHTS.....APPLICANT
LAWYERS INITIATIVE (For and on behalf of its Members in Anambra State)

AND

1. MINISTER OF INDUSTRY, TRADE AND INVESTMENT
2. ATTORNEY GENERAL OF THE FEDERATION } **RESPONDENTS**
3. NATIONAL INFORMATION TECHNOLOGY DEVELOPMENT AGENCY (NITDA)

JUDGEMENT

By an Originating Summons dated 16/11/20 but filed on 17/12/20, the Applicant seeks the following reliefs:

1. *A DECLARATION that by virtue of articles 1.1(a), 2.2 and 2.3 of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is guaranteed under right to private and family life provided under section 37 of the Constitution of the Federal Republic of Nigeria.*

2. *A DECLARATION that the Respondents' processing of personal data under MSME Survival Fund (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) is likely to*

interfere with the Applicant's members' right to private and family life provided under section 37 of the Constitution of the Federal Republic of Nigeria.

3. *A DECLARATION that the Respondents' failure to publish a privacy policy in their portal (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) constitutes a violation of regulation 1.1(a), and 2.5 of the Nigeria Data Protection Regulation (NDPR) 2019 which provision safeguarded the right to privacy guaranteed under Section37 of the Constitution of the Federal Republic of Nigeria.*

4. *A DECLARATION that the Respondents' failure to provide information on their portal (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) relating to processing of personal data in a concise, transparent, intelligible form constitutes a violation of Regulation 3.1(1) of the Nigeria Data Protection Regulation (NDPR) 2019 which provision safeguarded the right to privacy guaranteed under Section37 of the Constitution of the Federal Republic of Nigeria.*

5. *A DECLARATION that the Respondents' failure to provide on their portal (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) relating to contact details of its Data Protection Officer, legal basis of processing, recipients of personal data etc constitutes a violation of Regulation 3.1 Nigeria Data Protection Regulation (NDPR) 2019 which provision safeguarded the right to privacy guaranteed under Section37 of the Constitution of the Federal Republic of Nigeria.*

6. A Declaration that the 1st Respondent's failure as a Data Controller to delegate a Data Protection Officer with respect to the processing of personal data on its portal (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) through the Federal Ministry of Trade and Industry and Investment constitute a violation of Regulation 4.1(2) of the Nigeria Data Protection Regulation (NDPR) 2019 which provision safeguarded the right to privacy guaranteed under Section37 of the Constitution of the Federal Republic of Nigeria.

7. A Declaration that the 1st Respondent's processing of personal data on the (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) portal without developing security measures to protect data, storing data securely with access to specific authorized individuals employing data encryption technologies, developing organizational policy for handling personal data constitute a violation of Regulation 2.6 of the Nigeria Data Protection Regulation (NDPR) 2019 which provision safeguarded the right to privacy guaranteed under Section37 of the Constitution of the Federal Republic of Nigeria.

8. AN Order mandating the 1st Respondent to immediately publish a privacy policy for its MSME Survival Fund on a conspicuous part of its portal (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) upon the delivery of judgment herein.

9. An Order mandating the 1st Respondent to designate a Data Protection Officer (DPO) for its MSME survival Fund (https://www.survivalfund.gov.ng and

https://www.survivalfundapplication.com) and publish his or her contact on the portal.

10. An Order mandating the Respondents to comply with the provisions of Regulation 3..1(7) of the Nigerian Data Protection Regulation by immediately providing comprehensive information on its (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) portal relating to:

a) The identity and the contact details of the Controller;
b) The contact details of the Data Protection Officer;
c) The purpose(s) of the processing for which the personal Data are intended as well as the legal basis for the processing;
d) The legitimate interest pursued by the Controller or by a third party;
e) The receipts or categories of receipts of the personal data, if any
f) The period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
g) The existence of the Data Subject's rights.
h) The existence of the automated decision-making, including profiling and, at least, in those vases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the Data Subject;
i) Where the Controller intends to further process the personal data for a purpose other than that for which the personal data were collected, the Controller shall

provide the data subject prior to that further processing with information on that other purpose and with any relevant further information.

11. An Order mandating the 3rd Respondent to ensure that the 1st and 2nd Respondent comply with the provisions of the Data Protection Regulation and /or other Data protection legislation while processing personal data via its (https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) portal.

12. Perpetual Injunction restraining the Respondents and/or their agents from further processing (collection and retention)of Bank Verification Number (BVN) until it publishes its privacy policy and designates a Data Protection Officer (DPO)

The above reliefs are sought on the following grounds:

1. *The Applicant is a civil society organization committed to the enforcement and promotion of digital rights in Nigeria.*
2. *Regulation 4.1(8) of the Nigeria Data Protection Regulation 2019 gives the Applicant the right to ensure compliance with the Nigeria Data protection Regulation 2019.*
3. *Section 37 of the Constitution of the Federal Republic of Nigeria guarantees the right to freedom of privacy and family life.*
4. *The Respondents, through the Federal Ministry of Industry, Trade and Investment operates the MSME Survival Fund on an online portal hosted as*

(https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) through which, it processes the personal data of applicants including through Bank Verification Number and other highly sensitive data of the Applicant's members and other citizens.

5. *The Respondents did not publish its privacy policy on the portal, appoint a Data Protection Officer, develop security measures to protect data, store data securely with access to specific authorized individuals, and employ data encryption technologies or develop organizational policy for handling personal data.*
6. *The Respondents also does not take any data protection measures or comply with the provisions of the Nigeria Data Protection Regulation 2019.*
7. *The Respondents' actions are very likely to violate the Applicant's members right to privacy guaranteed under Section 37 of the of the Constitution and several provisions of the Nigerian Data Protection Regulation issued to protect and enforce right to privacy.*

In support is a statement dated 16/12/20 but filed 17/12/20. Also is an Affidavit of 17 paragraphs deposed to by **Izuchukwu Umeji** on 17/11/20 to which 6 exhibits were attached and marked as **Exhibits 1-6,** and a Written Address dated 16/11/20 but filed on 17/11/20 wherein 6 issues were coined from the reliefs sought above.

In reaction to the processes of the 1st Respondent, the Applicant filed a Further Affidavit of 11 paragraphs deposed to

by **Izuchukwu Umeji** on 15/07/21 together with a Written Address dated 09/07/21 but filed on 15/07/21.

In reaction to the suit, the 1st Respondent filed a Counter Affidavit of 17 paragraphs deposed to by **Oluwafemi Kolusade** on 06/07/21 wherein 1 exhibit was attached and marked as **Exhibit FG1** together with a Written Address dated and filed on 06/07/21 wherein 2 issues were formulated and argued as follows:

1. ***Whether the way the suit is presently constituted is incompetent and this has robbed off this Honourable Court the requite jurisdiction to hear and determine the Applicant's application.***

2. ***Whether the Applicant's suit is an abuse of court process and has rendered it liable to be dismissed.***

Also filed is a Further Counter Affidavit deposed to by **Oluwafemi Kolusade** on 29/09/2021 to which was attached 1 exhibit marked as **Exhibit FG1.**

It is noteworthy that the 2nd and 3rd Respondents filed no processes in response to the suit despite service on them of court processes and hearing notices inclusive of personal correspondences from the counsel to the Applicant.

The above represents the processes filed by the parties in this suit. Now, on 15/10/2021 when the matter came up for hearing, **Izuchukwu Omeji Esq.,** for the Applicant, adopted

his processes, adumbrated on same, and urged the Court to resolve the dispute in favour of the Applicant.

BACKGROUND FACTS

The Applicant is a civil society organization with the objectives of promoting and protecting digital right of citizens which includes online expressions, internet based communication and data protection. The complaint of the Applicant is that the Respondents through the 1st Respondent had set up Micro Small and Medium Enterprise (MSME) Survival Fund on an online portal hosted as (https://www.survivalfund.gov.ng andhttps://www.survivalfundapplication.com), and through it processes personal data including Bank Verification Number and other highly sensitive data of Nigerian citizens applying for the said funds. The Applicant claims that on the 1st of September 2020, the Applicant's members sought to apply for the said funds when it discovered requirement of sensitive information outlined above, and that the 1st Respondent had not published a privacy policy or notice in the portal through which it processes the data submitted to it. The Applicant also claimed that the 1st Respondent had also not appointed a Data Protection Officer for the said portal and has also not developed any security measures to protect data, store data securely with access to specific authorized individuals. The

Applicant believes that the 1st Respondent having failed on the above responsibilities had violated the Data Protection Regulation (NDPR) and the inaction is likely to violate the right to privacy and family life as provided for in Section 37 of the 1999 Constitution of its members and hence this suit.

The 1st Respondent on the other hand claimed that the said portal was set up and being used with all security measures and statutory provisions regarding the privacy of data being collected, duly observed.

The parties are now before the Court to determine the true position of things.

DETERMINATION OF SUIT

Although parties have formulated quite a number of issues, I believe the below issue will accommodate the contentions and submissions of the parties. The issue is:

Whether or not from the circumstances of this present case, the Respondents had failed to comply with the Nigeria Data Protection Regulation, 2019 resulting in the likely infringement of the Applicant's members right to private and family life provided for in Section 37 of the Constitution.

In urging the Court to grant the reliefs sought, the learned counsel to the Applicant contended that the right to private and family life also spans to the privacy of data and that it is for this purpose that the Nigeria Data Protection Regulation was issued to protect the privacy of information and data of citizens of Nigeria. Learned counsel contends that part of the information collected by the Respondents includes names and phone numbers and that the superior court has given decision relating to how such collated data can be used to infringe the right to private and family life and also that the Applicant need not wait for his fundamental right to privacy to be violated before approaching the Court. Counsel argued that the 1st Respondent does not have a privacy policy on its portal through which it processes vital information and failure to do so is a contravention of the provision of Regulation 2.5 of the NDPR and that the 1st Respondent has also failed to provide any information relating to the processing of data in line with their duty of transparency owed to data subjects under Regulation 3.1(1) of the NDPR. Learned counsel also contends that the 1st Respondent has equally failed in its obligation to provide details of its Data Protection Officer (if any) and that the 1st Respondent being a Data Controller in line with Regulation 4.1(2), 1.3 ought to appoint a Data Protection Officer who would protect the information supplied to the

portal from foreign invasion by developing security measures in line with Regulation 2.6 of the NDPR. Finally, counsel submits that the security of data by Data Controllers is sacrosanct especially to prevent identity theft and other kinds of electronic fraud and hence the failure of the Respondents through the 1st Respondent to perform its obligation is one likely to occasion a breach of right to privacy of the Applicant. On the above, reliance was placed on the following authorities:

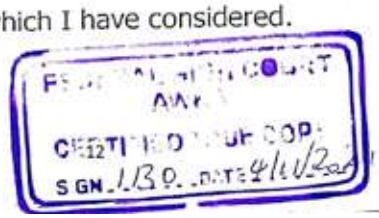
Nwali v. Ebonyi State Independent Electoral Commission (EBSIEC) (2014) LPELR- 23682 CA; Digital Right Lawyer Initiative v. National Identity Management Commission (unreported) Suit No. Ab/83/2020; M.L and W.W. v. Germany (ECTHR); Caty Germany GmbH v. Stadtsparkasse Magdeburg (C580/13) ECTHR.

On the other hand, the learned counsel to the 1st Respondent contends that the suit is incompetent for several reasons. First, that the affidavit in support of the suit was not deposed to by the Applicant and that the deponent has failed to provide details of how he learnt about the facts which he deposes to and for failing to comply with the provision of Order 2 Rule 4 of the Fundamental Right Enforcement Procedure Rules 2009 which robs the Court of its jurisdiction. Secondly, counsel

argued that the documents attached to the affidavit are computer generated documents and that the Applicants failed to comply with the requirement of Section 84 of the Evidence Act. Thirdly, learned counsel contends that the Applicant is not a juristic person known to law possessing the capacity to sue being that the Applicant is not a creation of statute neither is it an incorporated entity. It is also the contention of the learned counsel to the 1st Respondent that the Applicant's suit is an abuse of court process being that the suit was instituted to annoy and irritate the Respondents and abuse the mind of the Court and pollute it against the Respondents for its own selfish gain. On the above, reliance was placed on the following authorities:

Madukolo v. Nkemdilim (1962) 2 SCNLR 341; Elelu-Habeeb & Anor v. AGF & Ors (2012) LPELR 15515 (SC); FUTMINNA v. Okoli (2011) LPELR-9053(CA; Agbonmagbe Bank v. General Manager, GB Ollivant Ltd (1961)1 All N.L.R 116; AG Rivers State v. AG Akwa Ibom State (2011) NWLR (Pt 1248) Pg.95; Esogwa v. Nwosu (2020) LPELR- 50610 CA.

The above represents the summary of the position and submissions of parties which I have considered.



The Applicant has brought this suit to prevent the likely breach of the right to private and family life of its members as guaranteed under Section 37 of the 1999 Constitution. The Applicant's complaint is centered on the Respondents' alleged inaction through the 1st Respondent in protecting the data of the Applicant's members and other citizens submitted to the 1st Respondent's through the online portal for the MSME Survival Fund application process. The Applicant alleges that the Nigerian Data Protection Regulation 2019, created the obligation of data protection by Data Controllers like the 1st Respondent and failure to carry out the said obligation may likely occasion the breach of the privacy of the citizens applying for the said funds.

To resolve the above complaint, the Court must examine the facts presented against the background of the relevant provisions of the Constitution in danger of being breached by the alleged failure of the Respondent.

Now, Section 37 of the Constitution provides as follows:

> *The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication is hereby guaranteed and protected.*

The Nigerian Data Protection Regulation (NDPR) implicated in this suit provides as follows:

1.1(a) to safeguard the rights of natural persons to data privacy.

2.1(1) In addition to the procedure laid down in this Regulation or any other instrument for the time being in force, personal data shall be:

(d) secured against all foreseeable hazards and breaches such as theft, cyberattack, viral attack, dissemination, manipulations of any kind, damage by rain, fire or any other natural elements.

2.5. notwithstanding anything contrary in this Regulation or any instrument for the time being in force, any medium through which personal data is being collected or processed shall display a simple and conspicuous privacy policy that the class of data subject being targeted can understand.

2.6 anyone involved in data processing or the control of data shall develop security measures to protect data; such measures include but not limited to protecting system from hackers, setting up firewalls, storing data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policies for handling personal data (and for sensitive or confidential data), protecting of emailing system and continuous capacity building for staffs.

3.1(7) prior to collecting of data from data subject, the controller shall provide the data subject with the following information:

(a) the identity and the contact details of the controller

(b) the contact details of the Data Protection Officer

The complaint of the Applicant is as contained in paragraphs 12(a)-(e), 13 and 14 of the Affidavit of Izuchukwu Umeji where it was depose as follows:

12(a) that the 1st Respondent has not published its privacy policy on the https://www.survivalfund.gov.ng and https://www.survivalfundapplication.com) portal through which it processes our data as required by the Nigerian Data Protection Agency.

12(b) the 1st Respondent has not appointed and/or published the appointment of a Data Protection Officer for the said portal and/or the Federal Ministry of Industry, Trade and Investment which operates the portal.

12(c) that the 1st Respondent has not developed security measures to protect data, store data securely with access to specific authorized individuals.

12(d) that the 1st Respondent has not developed or published proof of data encryption technologies, develop organizational policies for handling personal data.

12(e) the 1st Respondent has not trained its staff on data protection.

13 I know as a fact that the 1st Respondent has no evidence whatsoever to show that it complies with the requirement of the Nigeria Data Protection Regulation.

14. The Respondents action are very likely to violate the Applicant's members right to privacy guaranteed by

Section 37 of the Constitution and several provisions of the Nigerian Data Protection Regulation issued to protect and enforce right to privacy.

The defence of the 1st Respondent against who direct allegation lies, is as contained in paragraphs 9 and 10 of the counter affidavit of Oluwafemi Kolusade where it was deposed as follows:

9. *that in response to the averments in paragraphs 12,13 and 14 of the affidavit, the 1st Defendant's portal was set up and being used with all security measures and statutory provision regarding the privacy of data being collected, being duly observed.*

10. *that the operation and activities of the Survival Fund were made transparent and available to the members of the public as published in the information handbook. The original copy of the said handbook is hereby attached and marked as exhibit FG1.*

I shall begin by resolving the preliminary arguments of the learned counsel to the 1st Respondent as it touched on the jurisdiction of this Court to determine the suit. I do not think any of the arguments of the learned counsel to the 1stRespondent in attacking the competence of the suit should succeed. First, the learned counsel is of the view that the Affidavit in support of the suit did not comply with the provision of Order 2 Rule 4 of the Fundamental Right Enforcement Procedure Rules as the deponent did not say how

he learnt about the fact he deposes to. I do not agree with the view of the counsel to the 1st Respondent. I have seen the said affidavit. The deponent, Izuchukwu Umeji is a member of the Applicant in this suit as averred in paragraph 1. And in paragraph 11, it was averred that on the 1st day of November 2020, members of the Applicant in Anambra State including the deponent sought to apply for the said Survival Funds when the Applicant discovered the alleged compliant for which purpose the suit was instituted. I believe that by the above, the deponent gave firsthand information of the facts deposed in the affidavit and thus it conforms to the provision of Order 2 Rule 4 of the Fundamental Rights Enforcement Rules. Secondly, on the argument that the documents attached as exhibits to the applicant's affidavit are computer generated and did not conform with Section 84 of the Evidence Act, I think this argument is paltry because the said exhibits were accompanied by a certificate pursuant to Section 84 of the Evidence Act 2011 dated the 15th day of November 2020. Lastly, I also do not consider the suit of the Applicant as misconceived. I do not see how the suit was instituted to annoy and irritate the Respondents and abuse the mind of the Court and pollute it against the Respondents for its own selfish gain. The Applicant has come to Court to ventilate its

grievance following the alleged inactions of the Respondents to comply with the provision of the NDPR.

Now, with preliminary argument out of the way, I have carefully examined the NDPR particularly Regulations 1.1(a), 2.1(d), 2.1(3), 2.3(b), 2.5, 2.6, and 3.1(7) outlined above and spelling out the obligations of data controllers and duties of data subject, as well as exhibits 3-6 which is an electronic document generated from the Applicant's computer on the MSME Survival Fund application portal of the 1st Respondent. First, I quite agree with Applicant that indeed the 1st Respondent is a data controller by virtue of Regulation 1.3(x) NDPR which defines a data controller as "***a person who either alone, jointly with other persons or in common with other person or a statutory body, determines the purpose for and the manner in which personal data is processed or to be processed.***" It has not been denied that the 1st Respondent is a statutory body who determines the manner in which personal data submitted to the online Survival Fund portal are to be processed. As a data controller, the Respondents are obliged by virtue of Regulations 1.1(a); 2.1(d); 2.5; 2.6; and 3.1(7)(a) and (b) set out above to do the following:

1. To safeguard the rights of natural persons to data privacy.
2. Secure against all foreseeable hazards and breaches such as theft, cyberattack, viral attack, dissemination, manipulation of any kind, damage by rain, fire or exposure to other natural elements
3. To display a simple and conspicuous privacy policy that the class of data subject being targeted can understand.
4. To develop security measures to protect data; such measures include but not limited to protecting system from hackers, setting up firewalls, storing data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policies for handling personal data (and for sensitive or confidential data), protecting of emailing system and continuous capacity building for staffs.
5. Provide their identities and contact details as controllers and the contact details of the Data Protection Officer.

The 1st Respondent to whom direct allegation lie did not really counter the Applicant's case by providing any evidence to show that the obligations set out above as a data controller were complied with. One would expect that for such allegations, the 1st Respondent will provide evidence to show that the said portal contains a request for data consent, data policy as well as the identity and contact of the controller and Data Protection Officer, all as set out above and as outlined in Regulations

2.3(b), 2.5 and 3.1(7) respectively of the NDPR. Needless to say, beyond merely saying generally in paragraphs 9 and 10 of the counter affidavit that the portal was set up and being used with all security measures and statutory provisions regarding the privacy of data being collected, and that the operation of the Survival Fund were transparent and available to members of the public, it did not provide any details to demonstrate or prove compliance with the privacy protecting and securing measures outlined in the Regulations. On the other hand, the Applicant has also furnished the Court with exhibits 3-6 which are photographs of the MSME Survival Fund Program online portal and in them, I see that neither of the obligations required of the 1st Respondent by the NDPR were complied with.

All things considered, I hold that the failure of the Respondents, from taking measures towards protecting the data privacy of the citizens, taking into account the vital information required from the data subject such as the Bank Verification Number(BVN), names and addresses, poses a threat to the Applicant's members right to private and family life owing to the fact that the objective of the NDPR as provided in Regulation 1.1 is to safeguard the rights of natural persons to data privacy. I must also quickly say that when there is a statute or regulation stipulating the manner that a thing or an act is to be

done or carried out, such legislation must be complied with strictly, otherwise such legislation becomes cosmetic. Notwithstanding the fact that the Survival Funds is an economic sustainability plan and for the public good, it must be organized and implemented in conformity with the law and in a way that the beneficiaries are not at risk of possible breach of the right to private and family life guaranteed them under Section 37 of the Constitution.

In the light of the above, the suit succeeds and I resolve the sole issue I had proposed in favour of the Applicant and against the Respondents. Accordingly, reliefs 1 to 12 are hereby granted to the Applicant.

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I make no order as to cost.

RRR - 3105 - 7031 - 8753

HON. JUSTICE NNAMDI O. DIMGBA
JUDGE
02/11/2021

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PARTIES: Absent.

APPEARANCES: Izuchukwu Omeji Esq. for the Applicant

4/11/2021

IN THE FEDERAL HIGH COURT OF NIGERIA
HOLDEN AT ABEOKUTA, OGUN STATE
ON WEDNESDAY THE 9TH DAY OF DECEMBER, 2020
BEFORE THE HON. JUSTICE IBRAHIM WATILA
JUDGE

SUIT NO: FHC/AB/CS /79/2020

IN THE MATTER OF AN APPLICATION BY INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVE FOR THE ENFORCEMENT OF DANIEL JOHN'S FUNDAMENTAL RIGHT TO PRIVATE AND FAMILY LIFE

BETWEEN:

INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVE - **APPLICANT**
(For and on behalf of Daniel John)

AND

NATIONAL IDENTITY MANAGEMENT COMMISSION - **DEFENDANT**

JUDGMENT

The matter for the enforcement of Fundamental Human Right was brought by way of an Originating Summons wherein the Applicant is seeking the following:

1. A DECLARATION that by virtue of Article 1.1(a) of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is included under right to privacy guaranteed by ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended).

2. A DECLARATION that the respondent's processing of digital identity cards via their software application (NIMC app) is likely to interfere with Daniel John's right to privacy as guaranteed under ***Article 1.1(a) of the***

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Nigeria Data Protection Regulation 2019 and *Section 37 of the Constitution of the Federal Republic of Nigeria, 1999* (as amended).

3. AN ORDER OF PERPETUAL INJUNCTION restraining the respondent from further releasing digital identity cards on their software application (NIMC app) or any other platform pending the independent report of external cyber security experts on the safety and security of the Respondent's applications.

4. AN ORDER directing the Cyber Security Experts Association of Nigeria (CSEAN) and/or Information Security Society of Africa (Nigeria) to conduct an audit of the respondent's software and other platforms through which it processes digital identity cards and submit a report to this court within 30days of delivery of judgment herein.

5. CONSEQUENTIAL ORDER(S) as this Honourable court may deem fit to make in the circumstance.

In the determination of the following questions:

i. ***Whether or not by the interpretation and construction of paragraph 3(e)(v) of the preamble to the Fundamental Rights Enforcement Procedure Rules and Section 46 of the Constitution 1999 (as amended) and Article 4.8 of the Nigeria Data Protection Regulation 2019, the Applicant has locus standi to commence bring this action for and on behalf of Daniel John?***

ii. *Whether or not by the construction of Article 1.1 (a) of the Nigeria Data Protection Regulation 2019 and Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), data protection is guaranteed under right to private and family life?*

iii. *Whether or not the Applicant is entitled to the reliefs sought?*

Grounds of Application:

i. Article 4.1(8) of the Nigeria Data Protection Regulation 2019 gives the applicant the right to ensure compliance with the Nigeria Data Protection Regulation, 2019.

ii. Paragraph 3(e)(v) of the Fundamental Rights Enforcement Procedure Rules empowers the applicant as an Association to file this suit on behalf of any individual.

iii. The Applicant is a civil society organization which is committed to the enforcement and promotion of digital rights in Nigeria.

iv. ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended) guarantees the right to freedom of privacy and family life.

v. The respondent processes data on their software app but same is not secure as it has been leading to data breach as reported by victims.

The affidavit in support was deposed to by one Ayo Rotifa and 7 exhibits were attached, Exhibit 1 – 7.

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In the Written Address in Support, Olumide Babalola Esq. raised 3 issues for determination:

i. Whether or not by the interpretation and construction of ***paragraph 3(e)(v) of the preamble to the Fundamental Right (Enforcement Procedure) Rules*** and ***Section 46 of the Constitution 1999 (as amended)*** and ***Article 48 of the Nigeria Data Protection Regulation 2019***, the applicant has *locus standi* to commence/bring in its action for and on behalf of Daniel John.

ii. Whether or not by the construction of ***Article 1.1(a) of the Nigeria Data Protection Regulation 2019*** and ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended) data protection is guaranteed under right to private and family life.

iii. Whether or not the applicant is entitled to the reliefs sought.

Issue 1

Counsel submitted that by the combined effect of ***Order 1 Rule 2 of Fundamental Right (Enforcement Procedure) Rules 2009 paragraph 3(e)*** of the Preamble to the ***Fundamental Right (Enforcement Procedure) Rules, Article 4.1(8) of the Nigeria Data Protection Regulation 2019*** as well as the cases of,

Mr. Francis Ogbe V. Mr. Dom Okonkwo (2018) LPELR-43876 (CA);

Olumide Babalola V. AG. Federation & Anor (2018) LPELR-43808 (CA);

the applicant has the *locus standi* to file this suit against the Respondent.

Issue 2

Counsel submitted that the right to privacy relates to any information affecting a person's life, body and his person and that the Nigeria Data Protection Regulation

was issued in furtherance of the right to privacy under ***Section 37 of the Constitution***. See ***Nwali V. Ebonyi State Independent Electoral Commission (EBSIEC) & Ors (2014) LPELR-23682 (CA)*** and Article 2.9 and Preamble to the Nigeria Data Protection Regulation 2019.

He urged the court to hold that a data breach is a violation of right to privacy and therefore the suit is properly commenced as a fundamental right enforcement application.

Issue 3

Counsel submitted that the applicant has deposed in the affidavit that the respondent processes personal data with an insecure software and is likely to interfere with his right to privacy. That an applicant can approach the court to seek for redress before the right is violated. ***Mbadike V. Lagos Int. Trade Fair Complex Management Board (2017) LPELR-41968 (CA).***

He submitted that by Article 2.1(a) and 2.6 of the Nigeria Data Protection Regulation, the respondent has the duty of protecting personal data from breaches. He urged the court to hold that the Applicant is entitled to the reliefs sought.

The respondent filed their counter affidavit on the 7th October, 2020. In the written address in support, counsel, Adedotun Isola-Osobu Esq. settled three issues for determination:-

i. ***Whether or not by the interpretation and construction of paragraph 3(e)(v) of the preamble to the Fundamental Rights Enforcement Procedure Rules and Section 46 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Article 4.8 of the Nigeria***

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Data Protection Regulation 2019, the applicant has locus standi to commence bring in this action for and on behalf of Daniel John

ii. *Whether or not by the construction of Article 1.1(a) of the Nigeria Data Protection Regulation 2019 and Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) data protection is guaranteed under right to private and family life.*

iii. *Whether or not the applicant is entitled to the reliefs sought.*

By way of preliminary argument, counsel submit that the applicant has not produced any confirmation from the National Information Technology Development Agency (NITDA) that the Nigeria Data Protection Regulation has been gazette in order for the court to presume its genuineness in accordance with ***Section 148 of the Evidence Act 2011***.

Our Line Limited V. S.C.C. Nigeria Ltd & Ors (2009) LPELR 2833(SC) Pp 29 – 32.

INEC V. Ogbadibo Local Govt. Council & Ors (2014) LPELR 22640 (CA) Pp 40 – 41

Ibrahim V. Barde (1996) 9 NWLR (Pt.474) 513 at 579.

Counsel submitted that the evidence relied upon by the Applicant is manifestly unreliable. That the applicant's basis for this suit is hinged on social media (twitter print outs) which does not constitute credible evidence.

Also that the evidence of the alleged breach relied on by the applicant constitutes documentary hearsay and same cannot be relied on by the court by virtue of ***Section 38 of the Evidence Act 2011***.

Ojo V. Gharoro (2006) LPELR 2383 (SC)

Osigwelem V. INEC (2010) LPELR – 4657 (CA)
Arogundade V. The State (2009) 6 NWLR (Pt.1136) pg. 165 at 181 – 182
Buhari V. Obasanjo (2005) 13 NWLR (Pt.941) P.1.

Moreso, that the evidence of the applicant is not credible enough to justify the grant of the declaratory reliefs it seeks. This is because declarations are granted on cogent and credible evidence - ***Fafunwa V. Bellview Travels Ltd. Pp. 15 – 16 (2013) LPELR – 20800 (CA)***.

Counsel adopted the applicant's issues for determination and argued as follows:-

In his argument, counsel submitted that the applicant lacks the locus standi to maintain this suit as it is not enrolled on the platform of the respondent and has not deposed to any fact to show how the actions of the respondent will infringe any of the fundamental rights applicable to it.

Moreso, the person who is alleging a likely breach of his fundamental right is not indisposed or in any way inhibited from maintaining this action personally.
Article 11.2(b) of the Nigeria Data Protection Regulation applies only to natural persons which the applicant is not, thus he is not entitled to file the instant suit in its name.

He further argued that the permission granted under ***Article 4.1(8) of the Nigeria Data Protection Regulation 2019*** to ensure compliance its provision is not the same thing as an authority to maintain action on behalf of Daniel John and notwithstanding the arguments canvassed, the applicant's case is not a fundamental right enforcement action but at best an issue of data protection.

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And that the applicant's complaint bothers on administrative decision of the respondent and not the personal right to private and family life of Daniel John therefore takes it out of the purview of the ***Fundamental Right (Enforcement Procedure) Rules, 2009.***

Issue 2

Counsel submitted that the applicants filing of this suit as a fundamental right action is of no moment as the Applicant cannot claim data protection as part of fundamental right to privacy under Section 37 of the Constitution as it would mean imputing into *Section 37* what is not contained therein.

Marwa & Ors. V. Nyako & Ors (2012) LPELR – 7837 (SC)
AC & Anor V. INEC (2007) LPELR 66 (SC)

He stated that the Nigeria Data Protection Regulation was made pursuant to the National Information Technology Development Agency (NITDA) Act and ***Section 37 of the 1999 Constitution. Governor of Oyo State & Ors V. Folayan (1995) LPELR-3179 (SC) P.59.***
Osadebay V. AG Bendel State (1991) LPELR – 2781(SC) pg.40.

Submits also that the papers Journals referred to in the applicant's address are simply of academic value and have no force of law while the foreign decisions cited are at best of persuasive effect and not binding.
Inakoju V. Adeleke (2007) LPELR – 1510 (SC)
Alli V. Okulaja (1972) 2 All NLR 351
Dada V. State (1977) 2 NLR 135
Eliochin (Nig) Ltd V. Mbadiwe (1986) 1 NWLR (Pt.14) 47
Oladiran V. The State (1986) 1 NWLR (Pt.14) 75

Also, there are no facts to show the similarities between the provision of privacy data laws or regulation. They are therefore of no jurisprudential value.

Olafisoye V. FRN (2004) LPELR-2553(SC) at Pp 87-88.

Kalu V. Odili (1992) LPELR – 1653 (SC) PP 41 – 42.

That the applicant has not put facts before the court to support a breach or likely breach of his right as enshrined in ***Section 37 of the 1999 Constitution*** to warrant commencement of fundamental right action against the respondent before the court and therefore does not disclose any reasonable cause of action against the respondent.

Sea Trucks Nig. Ltd. V. Anigboro (2001) 21 WRN 1

Tukur V. Government of Taraba State (1997) 6 NWLR Pt.560549.

Tukur V. Government of Gongola State (1989) 4 NWLR (Pt.1117) 517.

And that the act being challenged does not feature in ***Section 37*** or throughout the entirety of ***Chapter 4 of the 1999 Constitution*** and can therefore not be a fundamental right action.

Raymond Dongtoe V. Civil Service Commission of Plateau State (2001) 19 WRN 125 at 147

Basil Egbuonu V. Borno Radio Television Corporation 1993 4 NWLR (Pt.285) 13.

Issue 3

Counsel submitted that the applicant's prayer is speculative, incompetent and non-justiciable under fundamental human rights enforcement procedure. That Relief 1 of the applicant is an invitation for the court to go outside its scope and input into

Section 37 of the Constitution what is not contained therein and go outside its scope of interpreting law to making laws.

For Relief 2, counsel submitted that a declaration can only be granted when there is a breach and not a mere likelihood.

Chukwuma V. Shell Petroleum (Nig.) Ltd. (1993) LPELR 864 (SC) P.64

Nworika V. Ononize-Madu & Ors (2019) LPELR-46521 (SC)

Attorney General of Plateau State V. Attorney General of the Federation (2006) 3 NWLR (Pt.967) 346 at 419.

As regards Relief 3, counsel submitted that it is incompetent neither is it founded on the provisions of the Nigeria Data Protection Regulation - ***Fundamental Right Enforcement Procedure Rules of 1999 Constitution. Akinyemi V. Odu'a Investment Co. Ltd (2012) LPELR-8270 (SC),***

ACME Builders Ltd V. KSWB (1999) 2 NWLR (Pt.590) pg.288.

As for Relief 4, counsel submitted that the persons mentioned are not parties to the suit and therefore no orders can be sought or made against them.

Oyeyemi & Ors V. Owoeye & Anor (2017) LPELR-41903 (SC) P.27.

Kokoro-owo & Ors V. Lagos State & Ors 2001 LPELR-1699 (SC)

Counsel urge the court to dismiss the suit with substantial cost as it is frivolous, vexations and unmeritorious.

The applicant further filed a further affidavit of 10 paragraphs on the 19th October, 2020 and exhibit '2'

In the reply on point of law, counsel replied as follows:-

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Submits that gazetting of enactment, law, regulations is not a pre-condition for its validity.

Dike & Ors V. Governor of Imo State & Anor 2012 LPELR-20868 (CA)

Deaconess (Mrs) Felicia Ariwola Ogundipe V. The Minister of Federal Capital Territory & Ors (2014) LPELR-22771 (CA).

And that the ***Section 106*** cited by the respondent does not make it mandatory for official government communication to be gazetted and there is a presumption of regularity in line with ***Section 168(1) of the Evidence Act 2011***.

Tom V. National Park Service of Nigeria (2011) LPELR-8142 (SC)

On the credibility of evidence adduced, counsel submitted that the evidence it adduced is credible, cogent and manifestly reliable by the court and having not contradicted or discredited the identities of the Nigerian data subjects, admitted facts need no further proof.

Owena Mass Transportation Co. Ltd V. Okorogbo (2018) LPELR – 45221 (CA).

That the Applicant has the locus standi to sue, even though he is not directly affected as the law allows an association or civil society to institute on behalf of persons who alleges breach - ***Paragraph 3(e)*** of the preamble to the ***Fundamental Right (Enforcement Procedures) Rules 2009.***

Dilly V. I.G.P. 2016 LPELR – 41416(CA).

Submits that the applicant's need not suffer a breach before seeking redress. ***Section 46(1) of the 1999 Constitution***, that what the applicant seek to protect is the likely

breach of Daniel John personal data as defined in ***Article 1.3(xxii) of the Nigeria Data Protection Regulations, 2019.***

Counsel urge the court to dismiss the counter affidavit of the respondent for lacking in merit and grant all their reliefs.

Resolution of Issues

I have painstaking gone through the originating summons and the accompanying process, I equally perused carefully through the counter affidavit of the respondent as well as the accompanying process too. Same has been earlier produced. I have also taken my time to go through the exhibits filed by parties in support of their claim. I also, studied extensively, the various written addresses of the parties and the reply on points of law. Having done all these, I will proceed to determine the case on the merit.

Going by settled judicial authorities, *locus standi* denotes legal capacity to institutes proceedings in a court of law. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint laid before the court. Accordingly, no other person except the person on whom it vest the aggregate of the enforceable right in a cause has the standing to sue. ***Ojukwu V Ojukwu & anor (2008) 4 NWLR (PT 1078) 435; Attorney General of Anambra state V Attorney General of the Federation (2007) 12 NWLR (PT 1047).***

The main test or determinant of locus standi is whether the plaintiff or as in the instant case, the applicant, from his pleadings, has disclosed sufficient interest in the subject before his suit. Once he discloses in his pleadings, his sufficient interest in the subject matter, his is by law entitled to sue. See ***Atoyebi V. Governor of Oyo state (1994) 5 NWLR (Pt. 344) 290***. In the case at hand, the pertinent question here

is: has the applicant disclosed sufficient interest in his originating summons, statement and affidavit to entitle him to sue? No doubt, the applicant is a non-governmental organization registered with the Corporate Affair Commission as evidenced in Exhibit 1. Notwithstanding this however, it is still pertinent to fall back on the question whether or not the applicant right has been breached as a result of the respondent action and enough for him to rightfully institute this action. There is no gainsaying the fact that the applicant is filing this action on behalf of Daniel John. ***Abraham Adesanya V. F.R.N. & anor (1981) ALL NLR 1; See Attorney General of Anambra State V. Attorney General of the Federation (2007) 12 NWLR (Pt. 1047) 4; Adeyemi V. Opeyori (1976) 9-10 SC 31***. In the instant case, no statement of claim is required and none was filed. The relevant documents or processes before the Court that need to be looked at in determining the issue are the Originating Summons and the affidavit in support. The applicant's argument is that while it is not directly affected by the breach, however by paragraphs 3 of the preamble to the ***FREP Rules 2009***, it can bring this instant action. It provides:

> *(e) The Court shall encourage and welcome public interest litigations in the human right field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:*
>
> *(i) Any one acting in his own interest;*
>
> *(ii) Anyone acting on behalf of another person;*
>
> *(iii) Anyone acting as a member of, or in the interest of a group or class of persons;*
>
> *(iv) Anyone acting in the public interest, and*
>
> *(v) Association acting in the interest of its members or other individuals or groups.*

From the foregoing it is obvious that the applicant can have the locus standi to bring this action under (v), if and when it is a breach of Fundamental Right action. I quite agree with the applicant that the law is settled that it is not only one whose right has been infringed upon that can depose to affidavit, ***Order II (4) of the Fundamental Right Enforcement Procedure Rules 2009*** states:-

> ***4. The affidavit shall be made by the Applicant, but where the applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the Applicant, stating that the Applicant is unable to depose personally to the affidavit.***

However, it is obvious from the facts of this case that the applicant is not in custody, there is no proof of his claim of being indisposed that makes him unable to depose to the affidavit in support in fact, aside from exhibit 2, there is nothing before the court to show that Daniel Johns data was wrongly exposed or particularly interested in pursuing this action. This court is of the opinion that the applicant is just using Daniel John to be the face of this action so that it can conveniently sneak it under Fundamental Right Enforcement action. This court is not impressed. I am aware that the action is not a representative action. I have once again gone through the process of the applicant vis-a-vis the provision of the law; it is the holding of this court that the applicant does not have the requisite *locus standi* to institute this instant action on behalf Daniel John. The applicant has brought this action under ***Section 37 of the 1999 constitution and Articles 1.1, 2.1(d), 2.6 and 4.1(8)*** of the Nigeria Data Protection Regulation. They are reproduced below: -

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1.1 OBJECTIVES OF THE REGULATION

The objectives of this Regulation are as follows:

a) to safeguard the rights of natural persons to data privacy;

b) to foster safe conduct for transactions involving the exchange of Personal Data;

c) to prevent manipulation of Personal Data; and

d) to ensure that Nigerian businesses remain competitive in international trade through the safe-guards afforded by a just and equitable legal regulatory framework on data protection and which is in tune with best practice.

2.1(d) secured against all foreseeable hazards and breaches such as theft, cyberattack, viral attack, dissemination, manipulations of any kind, damage by rain, fire or exposure to other natural elements.

2.6 Anyone involved in data processing or the control of data shall develop security measures to protect data; such measures include but not limited to protecting systems from hackers, setting up firewalls, storing data securely with access to specific authorized individuals, employing data encryption technologies, developing organizational policy for handling Personal Data (and other sensitive or confidential data), protection of emailing systems and continuous capacity building for staff.

4.1(8) The mass media and the civil society shall have the right to uphold accountability and foster the objectives of this Regulation.

Having read and digested the above provisions, I am of the of the opinion that the applicant cannot choose and pick which statute is favourable to him while neglecting salient part of the statute. By regulation 4.2(6)

-Any breach of this Regulation shall be construed as a breach of the provisions of the National Information Technology Development Agency (NITDA) Act of 2007.

This provision takes it out of the purview of fundamental right action, therefore only a data subject can legally sue for breach of his data and that can only be done under the Nigeria Data Protection Regulation/NITDA Act, 2007.

Section 37 of the 1999 constitution states that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.

It is settled law that the jurisdiction of our courts is derived from Statute and the Constitution. Hence where the Constitution has declared that the courts cannot exercise jurisdiction, any provision in any law to the contrary will be inconsistent with the provision of the Constitution and void. The 1999 Constitution has settled how to seek redress for the breach of violated or likely to be violated right once proved. ***Section 46(1) of the 1999 Constitution***, states:-

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> *-Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state into him may apply to a High Court for the redress"* (emphasis mine).

It is clear therefore that applicant must allege that any of his rights contained in Chapter IV was/were contravened or infringed upon, is being infringed or is likely to be contravened. Therefore, before any action can be brought under the ***Fundamental Rights Enforcement Rules, 2009***, they must primarily be reliefs that alleged breach of a fundamental right. It is not every perceived breach of a right that falls under the Fundamental Rights Procedure, the root of the breach is important and must come within those rights named specifically under Part IV of the 1999 Constitution - ***Usman & Ors. V. IGP & Ors. (2018) LPELR-45311(CA).***

The court in the case of ***Igwe V. Ezeanochie (2009) LPELR-11895 (CA)*** gave a guide as to determining reliefs under fundamental right action when it stated:-

> *"Whenever the Court is confronted with an application brought under the Fundamental Right (Enforcement Procedure) Rules, it is imperative that the Court should critically examine the reliefs sought by the Applicant, the grounds for seeking the reliefs and the facts contained in the statement accompanying the application and relied on for the reliefs sought. Where the facts relied on disclose infringement of the fundamental right of the applicant as the main or basis of the claim, then it is a clear case for the fundamental Right (Enforcement procedure) Rules.*

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In the case of ***Abdulhamid v. Akar (2006) 13 NWLR (Pt. 996) 127*** the issue of proper reliefs under Fundamental Human Rights application was also pronounced upon in the following words:-

> *"The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief sought is for the enforcement or for securing the enforcement of a fundamental right and not from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim for the enforcement of fundamental right. Thus, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right.*

See ***Federal Republic of Nigeria & Anor v. Ifegwu (2003) 15 NWLR (Pt. 842) 113, at 180. Tukur v. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549; and Sea Trucks (Nig.) Ltd. v. Anigboro (2001) 2 NWLR (Pt. 696) 159.***

The question to answer then is whether going by the reliefs and the questions in the originating summons, the matter is one that can come under the Fundamental Rights Enforcement Procedure thus conferring jurisdiction on this court. The simple guide is that the main relief should be a fundamental right relief and not an ancillary relief.

It is just like identifying a cause of action in a statement of claim. Where however, the main relief is not the enforcement of a fundamental right or securing the

enforcement of a fundamental right the jurisdiction of the court cannot be properly invoked or exercised as the court will be incompetent to do so. ***EFCC v. THOMAS (2018) LPELR-45547(CA)***. ***Section 37 of the Constitution*** states:

> ***The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."***

I refer to the reliefs and the question in the originating summons as well. The applicant/respondent sought for 5 reliefs on the face of the Originating Summons they are:

1. A DECLARATION that by virtue of Article 1.1(a) of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is included under right to privacy guaranteed by ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended).

2. A DECLARATION that the Respondent's processing of digital identity cards via their software application (NIMC app) is likely to interfere with Daniel John's right to privacy as guaranteed under Article 1.1(a) of the Nigeria Data Protection Regulation 2019 and ***Section 37 of the Constitution of the Federal Republic of Nigeria, 1999*** (as amended).

3. AN ORDER OF PERPETUAL INJUNCTION restraining the Respondent from further releasing digital identity cards on their software application (NIMC app) or any other platform pending the independent report of external cyber security experts on the safety and security of the Respondent's applications.

4. AN ORDER directing the Cyber Security Experts Association of Nigeria (CSEAN) and/or Information Security Society of Africa (Nigeria) to conduct an audit the Respondent's software and other platforms through which it processes digital identity cards and submit a report to this court within 30days of delivery of judgment herein.

5. CONSEQUENTIAL ORDER(S) as this Honourable court may deem fit to make in the circumstance.

I find none of the reliefs seeking for redress of the applicant's or Daniel John breach or likely breach of his fundamental right. It simply shows that the enforcement of human right is not the principal relief or any relief at all in this case. but ancillary relief in the instant application. I will further express my displeasure at counsel by citing with the approval the dictum of Niki Tobi, JCA (as he then was) in the case ***of Peterside v. I. M. B. (1993) 2 NWLR (pt. 278) 712 at 718 - 719***, as follows:

> *It has now become a fashion or style for parties to push or force the provisions of Chapter IV into most claims which cannot in law be accommodated by the chapter. Parties at times take undue advantage of the general and at time nebulous provision of the chapter and try to tailor in their actions even when the size of the "cloth" does not fit into it. The provisions of Chapter IV though appear omnibus and at large both in their character and context are chained here and thereby Constitutional gadgets by way of safeguards. Counsel by way of his professional calling and expertise may dexterously frame a claim or relief to have the semblance of a breach of a constitutional right as*

contained in Chapter IV of the Constitution. He does this to give the matter a higher status in the litigation process... But where an action does not have a Constitutional flavor in the sense that the provisions of the Constitution are not breached, it cannot be elevated to the status of a Constitutional wrong. A trial Judge should in such circumstances be able to apply the eye of an eagle to scrupulously examine the character and context of the claim with a view to removing the chaff from the grain and come to grips with the camouflage or disguise in the action. He has to unveil the pretentious legal phraseology of the action and take an appropriate decision."

I have carefully perused the facts of this case and the reliefs sought in respect thereof. It is clear to me that the case of the applicant is interpretation of several Articles of Nigeria Data Protection Regulation, 2019, and purported exposure of such data by the Respondent. I hereby hold that this instant application is not proper to be filed under Fundamental Rights action.

Assuming but not conceding that it is the main claim, the next question then is whether the applicant has proved his case? All the evidence adduced by the applicant did not prove the case of breach of Daniel John's Fundamental right. In bringing a matter for the enforcement of fundamental rights where such right had been violated, such fact must be proved by relevant evidence. By ***section 135 of the Evidence Act 2011***, it provides *"Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."* Who therefore has the burden of proof

in a fundamental right case? In ***Onah V. Okenwa (2010) 7 NWLR (pt. 1194) 512 CA pg. 516***, the court held:-

> ***"...He who asserts must prove. The burden of proof lies on an Applicant who applied for the enforcement of their fundamental rights to establish by credible affidavit evidence that their fundamental right was breached." It is the duty of an applicant alleging breach of his fundamental rights to place sufficient evidence before the Court. It was held in FAJEMIROKUN V. CB (CL) LTD (2002) 10 NWLR (part 774) 95 @ 113-114 paras. H-A that: "For an application alleging infringement of his fundamental rights to succeed, he must place before the Court all vital evidence regarding the infringement or breach of such rights. It is only thereafter that the burden shifts to the Respondent. Where that has been done or where scanty evidence was put in by the Applicant, the trial court can strike out such Application for being devoid of merits.***

See Mezue & Anor v. Okolo & Ors. (2019) LPELR-47666(CA). The applicant has failed to provide sufficient facts in his supporting affidavit to establish the infringement of Daniel John's fundamental right, the exhibits in support are not sufficient in proof of same. I have earlier stated that aside exhibit 2, there is nothing in support of the applicants claim to show that the data of the Daniel John was breach, all other exhibits attached in this case are irrelevant in proving the breach of the applicant or Daniel John's case.

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I have noted that the applicant filed this application using the Originating Summons procedure is unique and tailored towards achieving a desired goal in construing statutes. The Fundamental Right Procedure Rules, also has its own unique features e.g the breach, reliefs, statements of description of applicants, grounds, affidavit in support and exhibits where necessary. There is a standard format as against the use of an Originating Summons in commencing Fundamental Right action. Though it have been held in several judicial authorities and in the Rules, 2009, that any form of commencement of action is acceptable to commence a Fundamental Right action, it may often leave the Court with great lacuna as in the instant case, the description of the applicant (Daniel John) was lacking in material particulars. The present applicant left a great deal of information by using the Originating Summons to bring this application or action on behalf of a pseudo applicant. A closer look at the grounds the Originating Summons was filed leaves a sour taste in the mouth for a right envisaged as a Fundamental Right action. This is one public interest litigation gone bad.

On whether the court can grant the reliefs in this case, none of the relief sought can be said to come under the provisions of ***Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999*** neither are the reliefs sought "*Fundamental Rights*". Having earlier held that this action cannot be litigated under the provisions of the ***Fundamental Rights (Enforcement Procedure) Rules, 2009***. Accordingly, declarations 1-2 and reliefs 3-5, in the originating summons cannot be determined under the ***Fundamental Rights (Enforcement Procedure) Rules, 2009*** nor granted. Also, the applicant lacks locus standi to bring this Originating Summons.

On the whole, the applicant's Originating Summons is hereby dismissed.

There is cost of ₦200,000.00 in favour of the defendant.

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This is the Judgment of Court delivered today this 9th day of December, 2020 in the open Court.

HON. JUSTICE IBRAHIM WATILA
JUDGE
9TH DECEMBER, 2020.

Parties - *Absent.*

Appearance - *Olumide Babalola Esq., for the applicant.*

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IN THE HIGH COURT OF JUSTICE
OGUN STATE OF NIGERIA
IN THE ABEOKUTA JUDICIAL DIVISION
HOLDEN AT ABEOKUTA

BEFORE HIS LORDSHIP, HON. JUSTICE O. OGUNFOWORA – JUDGE
ON MONDAY, THE 9TH DAY OF NOVEMBER, 2020

BETWEEN: SUIT NO. HCT/262/2020

INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS INITIATIVE
(For and on behalf of all its members) ..... APPLICANT

AND

L.T SOLUTIONS & MULTIMEDIA LIMITED ..... RESPONDENT

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JUDGMENT

The Applicant herein by an Originating Motion on Notice dated and filed on 29TH May, 2020 pursuant to the Fundamental Rights (Enforcement Procedure) Rules 2009 and Section 37 of the Constitution of the Federal Republic of Nigeria (as amended) and Sections 2.2., 2.5 & 2.10 of the Data Protection Regulation 2019 applied for the following Reliefs, contained in the Statement filed along with the Motion, against the Respondent:

1. A Declaration that by virtue of Article 1.1(a) of the Nigeria Data Protection Regulation (NDPR) 2019, data protection is guaranteed under right to privacy covered by Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

2. A Declaration that the Respondent's processing of personal data of over 200 million Nigerians, without legal basis violates the provision of Article 2.2 of the Nigeria Data Protection Regulation (NDPR) 2019 and likely to interfere with the right to privacy as guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

POPOOLA K.A
PRINCIPAL REGISTRAR

3. A Declaration that the Respondent's privacy policy as published on its website is likely to violate the Applicant's members fundamental rights to private life and family life as guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

4. A Declaration that the Respondent's processing of personal data without a valid privacy policy violates the provision of Article 2.5 of the Nigeria Data Protection Regulation (NDPR) 2019 and likely to violate Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended).

5. A Declaration that the Respondent is liable to be fined by virtue of Regulation 2.10 of the Nigeria Data Protection (NDPR) 2019 to the tune of 2% of the Respondent's Annual Gross Revenue of the preceding year or payment of the sum of 10 Million Naira, whichever is greater.

6. An Order mandating the Respondent to publish its privacy policy in full compliance with the Nigeria Data Protection Regulation 2019 on its website within 7 days from the delivery of judgment.

7. Consequential Order(s) as this Honourable Court may deem fit to make in the circumstance.

In support of this application, and in line with the provisions of the Fundamental Rights Enforcement Procedure Rules, 2009, the Applicant filed all relevant processes including exhibits and a Written Address in compliance with the Rules.

The Respondent in spite of being served with the originating processes and Hearing Notices for the trial of the matter did not file any process and also failed to turn up at the hearing of the matter thus evincing an intention to be bound by the decision of this Court.

The grounds for seeking the Reliefs as stated in the said Statement are as follows:

1. Regulation 4.1(8) of the Nigerian Data Protection Regulation 2019 gives the Applicant the right to ensure compliance with the Nigerian Data Protection Regulation 2019.
2. The Applicant is a civil society organisation which is committed to the enforcement and promotion of digital rights in Nigeria.

Learned Counsel for the Applicant in his Final Written Address has submitted the following issues for determination which in his Origination Motion he has however inaptly described as questions for determination:

1. Whether or not by the construction of Section 37 of the Constitution Republic of Nigeria, 1999 (as amended) and Article 1.1 (a) of the Nigeria Data Protection Regulation 2019, Data protection is guaranteed under right to private and family life?

2. Whether or not by the interpretation and construction of section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Respondent's processing of personal data of over 200 million without legal basis is not a violation and likely to further violate the Applicant's right to private and family life?

3. Whether or not the Respondent's processing of personal data without a valid privacy policy on its website is in violation of Regulation 2.5 of the Nigeria Data Protection Regulation 2019?

4. Whether or not by the interpretation and construction of Regulation 2.10 of the Nigeria Data Protection Regulation 2019, the Respondent is liable to be fined for the refusal/omission to publish its privacy policy?

I however deem the following issues as arising for determination-

1. Whether the Respondent invaded or is likely to threaten the Applicant's right to privacy as provided under Section 37 of the Constitution and the NDPR Regulations 2019.

2. Whether the Respondent can be ordered to comply with the law by publishing its privacy policy in full compliance with the NDPR 2019 Regulations.

3. Whether by this action, the respondent is liable to be fined for its failure to publish its privacy policy in compliance with the NDPR 2019 Regulations.

3. Section 37 of the Constitution of the Federal Republic of Nigeria (as amended) guarantee the right to freedom of privacy and family life.
4. The Respondent's act of processing personal data without legal basis violates the right to privacy and family life and Articles 2.2, and 2.5 of the Nigeria Data Protection Regulation 2019.
5. The Respondent has refused/omitted to publish a valid privacy policy on their website in violation of Article 2.5 of the Nigeria Data Protection Regulation 2019.

The facts of this case as discernible from the grounds of this application, the affidavit in support of it, the attached exhibits and the Written Address of Counsel show that the Respondent, a registered software company (with RC No. 1527940) that deals in the sale of personal data on 2nd May, 2020 tweeted on their Twitter handle **@linestechng** as follows - *"over 200 million fresh Nigerian and international email lists, sorted by age, state, lga, city, industry etc. send a dm or call 08139745545 to get yours"*, a copy of the said tweet is attached as Exhibit 2 to the affidavit in support. The affidavit further states that the Respondent processes the email addresses of members of the Applicant, a civil society organisation registered under the Companies and Allied Matters Act (CAMA) with the objectives of promoting and protecting the digital rights of citizens which include online expressions, internet-based communication and activities (attached as Exhibit 1 is the Applicant's certificate of incorporation). The affidavit further stated that from the particulars on the Respondent's website https://linestech.com.ng, the Respondent admits that it collects personal data in the privacy policy published on its website https://linestech.com.ng/privacy-policy/ (and attached to the affidavit as Exhibit 3 are the particulars on the Respondent's website as I hasten to add that each of Exhibits 2 and 3 also contain on their respective last pages, a certificate of compliance with Section 84 of the Evidence Act).

The Applicant thus contends that by the provisions of the Nigeria Data Protection Regulation (NDPR) 2019 (attached as Exhibit 4 to the affidavit in support) the Respondent which qualifies as a data controller under Article 1.3(x) of the Regulation does not have the legal basis to process and sell personal data of over 200 million Nigerians as the Applicant further contends that by the provision of Regulation 4.1(8) of the NDPR Regulations, it (i.e. the Applicant) has the right to ensure compliance with the said NDPR Regulations.

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In the determination of the above issues, I will consider the issues stated as arising for determination by Applicant's Counsel, if deemed necessary.

Let us now consider the first issue.

Section 37 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides as follows:

> *"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected"*

The decision of the Court of Appeal in **NWALI v EBONYI STATE INDEPENDENT ELECTORAL COMMISSION (EBSIEC) & ORS. (2014) LPELR – 23682** shows that the Court has no power to restrict the phrase "privacy of citizens" to specific situations but must interpret the word or phrase generally, liberally, and expansively to include privacy of citizens' body, life, person, thought, belief, conscience, feelings, views, decisions (including his plans and choices), desires, health, relationships, character, material possessions, family life, activities etc.

There have also been several generic and sector specific legislation that have been made pursuant to the provisions of Section 37 of the Constitution showing that the provisions indeed are to be expansively and liberally interpreted to ensure the privacy of citizens. In 2007, the Nigerian Communication Commission (NCC) established under the Nigerian Communications Act 2003 issued the General Consumer Code of Practice Regulations for Telecommunications Services, which amongst other things, imposes a duty on telecommunication licensees to take reasonable steps to securely store and prevent improper or accidental disclosure of customer information. Additionally, Section 8 of both the Childs Right Act, 2003 and the Child Rights Law of Ogun State contained in Volume 1 of the Laws of Ogun State 2006 recognise the right to privacy and protection from any publication of a child's identity.

Now as regards data protection, The Nigeria Information Technology Development Agency (NITDA), set up under the NITDA Act, 2007 is the government agency responsible for the regulation of the use and exchange of information and this Agency issued the Nigeria Data Protection Regulation, 2019 (The Regulation), which became operational from 25th January, 2019. The Regulation contains the Nigerian government's definitive policy statement on

Data Protection and was preceded by the Draft Data Protection Guidelines (The Guidelines) released in 2017. The Regulation provides for the operational modalities for the protection of data in Nigeria.

Let me set out its Preamble, notwithstanding its length, as well as its objectives as follows:

WHEREAS, The National Information Technology Development Agency (NITDA, hereinafter referred to as the Agency) is statutorily mandated by the NITDA Act of 2007 to inter alia:

Develop Regulations for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in government, commerce, education, the private and public sectors, labour and other fields, where the use of electronic communication may improve the exchange of data and information;

RECOGNISING that many public and private bodies have migrated their respective businesses and other information systems online. Information solutions in both the private and public sectors drive service delivery in the country through digital systems. These information systems have thus become critical information infra structure which must be safeguarded, regulated and protected against atrocious breaches;

COGNIZANT of emerging data protection regulations within the international community geared towards security of lives and property and fostering the integrity of commerce and industry in the volatile data economy;

CONSCIOUS of the concerns and contributions of stakeholders on the issue of privacy and protection of personal data and the grave consequences of leaving Personal Data Processing unregulated;

OBJECTIVES OF THE REGULATION

The objectives of this Regulation are as follows:

a) *safeguard of the rights of natural persons to data privacy;*
b) *foster safe conduct of transactions involving the exchange of personal data;*

c) *prevent manipulation of personal data and*
d) *ensure that Nigerian businesses remain competitive in international trade, through a just and equitable legal regulatory framework on data protection and which regulatory framework is in tune with global best practices.*

In the light of the above, I thus also have no hesitation in holding that the right to privacy extends to protection of a citizen's personal data such has been alleged that the Respondent has violated or is threatening to violate as I now go on consider whether the Respondent has indeed violated the Applicant's right to privacy or threatens to violate it.

Now Section 2.5 of the NDPR Regulation 2019 provides as follows:

"Notwithstanding anything contrary in this Regulation or any instrument for the time being in force, any medium through which Personal Data is being collected or processed ***shall*** *display a simple and conspicuous privacy policy that the class of Data Subject being targeted can understand. The privacy policy shall in addition to any other relevant information contain the following:*

a) *What constitutes the data subject's consent;*
b) *Description of collectable personal information;*
c) *Purpose of collection of Personal Data;*
d) *Technical methods used to collect and store personal information, cookies, JWT, web tokens etc.;*
e) *Access (if any) of third parties to Personal Data and purpose of access;*
f) *A highlight of the principles stated in Part 2;*
g) *Available remedies in the event of violation of the privacy policy;*
h) *The time frame for remedy; and*

Provided that no limitation clause shall avail any data Controller who acts in breach of the principles set out in this Regulation."

Did the Respondent comply with this provision or did it breach it? The Applicants have argued and deposed to the fact that the Respondent did not comply with this provision as reproduced in paragraphs 7 – 13, and 16 of the affidavit in support hereinafter reproduced as follows:

7. On the 2nd day of May 2020, the Respondent tweeted on their twitter page @linestechng that "over 200 million fresh Nigerian and international email lists, sorted by age, state, lga, city, industry etc. send a dm or call 08139745545 to get yours". Pleaded and marked "Exhibit 2" is the tweet

8. The Respondent boast of processing over 200million personal data of data subject, but their privacy policy violates the provision of Article 2.5 of the Nigeria Data Protection Regulation (NDPR) 2019.

9. The Respondent processes the Applicant's members email addresses.

10. The Respondent admits that it collects personal data in the privacy policy published on its website.

11. I know as a fact that, from the particulars on the Respondent's website https://linestech.com.ng, they do not have legal basis for processing and selling personal data of over 200million Nigerians. Pleaded and marked "Exhibit 3" are the particulars on their website.

12. The Respondent admits that it collects personal data in the privacy policy published on its website https://linestech.com.ng/privacy-policy/

13. I know as a fact, that the capacity of the Respondent to gain access to the foregoing information makes them a "data controller" under Article 1.3(x) of the Nigeria Data Protection Regulation (NDPR) 2019.

16. The Respondent continues to collect, control and process data of the Applicant's members but never published its privacy policy in accordance to Nigeria Data Protection Regulation 2019.

Since no Counter Affidavit or any other processes have been filed by the Respondent, it means that the Applicant only needs minimal proof of the facts in respect of the reliefs claimed in this suit.

c) *prevent manipulation of personal data and*
d) *ensure that Nigerian businesses remain competitive in international trade, through a just and equitable legal regulatory framework on data protection and which regulatory framework is in tune with global best practices.*

In the light of the above, I thus also have no hesitation in holding that the right to privacy extends to protection of a citizen's personal data such has been alleged that the Respondent has violated or is threatening to violate as I now go on consider whether the Respondent has indeed violated the Applicant's right to privacy or threatens to violate it.

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a) *What constitutes the data subject's consent;*
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c) *Purpose of collection of Personal Data;*
d) *Technical methods used to collect and store personal information, cookies, JWT, web tokens etc.;*
e) *Access (if any) of third parties to Personal Data and purpose of access;*
f) *A highlight of the principles stated in Part 2;*
g) *Available remedies in the event of violation of the privacy policy;*
h) *The time frame for remedy; and*

Provided that no limitation clause shall avail any data Controller who acts in breach of the principles set out in this Regulation."

Did the Respondent comply with this provision or did it breach it? The Applicants have argued and deposed to the fact that the Respondent did not comply with this provision as reproduced in paragraphs 7 – 13, and 16 of the affidavit in support hereinafter reproduced as follows:

Firstly, I agree with the Applicant that the Respondent qualifies as a Data Controller under Section 1.3(g) of the NDPR Regulations, as members of the Applicant will also qualify as Data subjects under Section 1.3(k) of the Regulations. I have also painstakingly gone through the facts in support of this Relief, as contained in the above-mentioned paragraphs and Exhibits 2 and 3, and I am also constrained to agree with the Applicants that the Respondent as a Data Controller has failed to comply with the Regulations by its failure to publish a privacy policy as provided under Section 2.5 of the Regulations showing the requisite information requested therein. I am however unable to agree with the Applicant that this infraction of the Regulations by simply failing to publish a privacy policy impinges on the privacy rights of the members of the Applicant without a clear and unambiguous deposition that the Respondent as a Data Controller failed to obtain the consent of Data subject (such as any of the Applicant's members) in contravention of the provisions of Section 2.3 of the Regulations relating to the Procuring of Consent which is reproduced hereunder as follows:

Section 2.3 Procuring Consent:

i. No data shall be obtainable except the specific purpose of collection is made known to the Data Subject.
ii. Data Controller is under obligation to ensure that consent of a Data Subject has been obtained without fraud, coercion or undue influence; accordingly,

The point I am struggling to make is that, notwithstanding the fact that I have found that the Respondent failed to comply with the law by publishing its privacy policy, the nature of these proceedings not being criminal or quasi criminal in nature, but one for the determination of whether the right of privacy guaranteed under Section 37 of the Constitution has been infringed or is likely to be infringed it behooves the deponent to the Applicant's affidavit in support to further show clearly how this failure to publish its privacy policy infringed this right to privacy as this failure simpliciter does not show an infringement of the right to privacy without an unambiguous deposition that any Data Subject's information has been processed without his (or her) consent.

I am thus unable to find that the right to privacy of the Applicant's members have been infringed or is likely to be infringed.

As regards Issues 2 and 3 above on whether this Court can order the Respondent to comply with the provisions of the NDPR Regulations or find the Respondent liable to pay a fine, my earlier position that this is not a criminal or quasi criminal nature robs this Court of the jurisdiction to determine these issues, and perhaps more importantly, this Court as a State High Court will lack the jurisdiction to determine these issues having regard to the fact that these Regulations are made by a body established by an Act of the National Assembly, i.e., a federal legislation and not under a State Law as it is trite that unless a Federal Act permits a State High Court to determine the infractions under these Regulations such as are applicable by statutory provisions for trials under the Robbery and Firearms Act for trials of Armed Robbery cases, or matters prosecuted under the Economic and Financial Crimes (EFCC) Act and Independent Corrupt Practices Commission (ICPC) Act. It is the Federal High Court that will thus have jurisdiction to determine this issue and I believe more appropriately upon the filing of criminal charges by the relevant government Agency, presumably the NITDA against transgressors of the Regulations which must necessarily arise after the arraignment of such transgressor including plea taking.

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The Reliefs related to these issues are thus liable to be struck out.

In the final analysis, while I grant Relief 1 of the Applicant's Relief, reliefs 2, 3 and 4 are dismissed while Reliefs 5 and 6 are struck out.

There shall be no Order as to Costs.

O. Ogunlowora
Judge

DELIVERED AT ABEOKUTA THIS 9th DAY OF NOVEMBER, 2020.

HIGH COURT OF OGUN STATE
ABEOKUTA
Cashier's Name
Signature
Date 18-11-2020

JUDICIARY
OGUN STATE

HIGH COURT OF OGUN STATE
ABEOKUTA
Cashier's Name
Signature
Date 18-11-2020

POOLA K.A.
PRINCIPAL REGISTRAR I

IN THE HIGH COURT OF LAGOS STATE
HOLDEN AT IKORODU JUDICIAL DIVISION
BEFORE HON. JUSTICE I. O. AKINKUGBE (MRS.) NO 34
SITTING AT HIGH COURT 1 IKORODU DIVISION
TODAY TUESDAY 26TH DAY OF OCTOBER 2021

IKD/3191GCM/2019

BETWEEN:
MR. HILLARY OGOM NWADEI - APPLICANT
AND
1. GOOGLE LIMITED LIABILITY COMPANY
2. CYCLOFOSS TECHNOLOGIES NIGERIA LTD (Latest Nigeria News) RESPONDENT

JUDGMENT

The Applicant by an Amended Originating Summons Brought pursuant to Order 3 Rule 5, 8, Order 6 Rule 5, Order 59 Rule 12 (1) & (2) of the High Court of Lagos State (Civil Procedure) Rules 2012 dated 30th January 2020 is seeking the following Orders:

1. A Declaration that the Applicant having completed the 8 months jail terms in United Kingdom in year 2015 had since then become a free man who has rights to his privacy and dignity of person as contained in the 1999 Constitution.
2. A Declaration that the Applicant's right to his private life, association and dignity of person are being threatened and violated by the Respondents by making the information/news of his arrest, arraignment, and imprisonment accessible to the whole world on the web and social media after four years of the completion of the jail terms.
3. An Order of this Honourable Court directing and compelling the Respondents and any other person or bloggers to forthwith remove all the news or information and block or restrict anybody and the whole world from further access to any news /information regarding the Applicant's criminal allegation of 2015 via the website on the search of his name.
4. And for such further or other orders as the Honourable Court may deem fit to make in the circumstances of this action.

In support of the Summons is a 21 Paragraph affidavit deposed to by the Applicant himself on the 30th January 2020, and a 4 Paragraph verifying affidavit dated 30th January 2020 with a written address filed along. Learned

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Chief Executive Officer

counsel for the applicant in moving the application moved in terms relying on the facts in the supporting affidavits, adopting the written address and urging the court to grant the application.

In opposition the 1st Respondent filed a 30-paragraph counter affidavit deposed to by an employee of the 1st respondent before a Notary public in the United States of America on the 12th November 2020 with a written address dated 20th November 2020 filed along. The learned counsel relied on the facts in the counter affidavit adopting the written submissions as their oral argument. The 2nd respondent who was served with the amended originating summons and a hearing notice neither appeared nor filed any counter affidavit.

SUMMARY OF FACTS

A summary of the facts as stated in the affidavits before the court are as follows. The Applicant is a priest and a Lawyer and presently unable to engage in any particular job due to information spread on the web and social media by the respondents and other bloggers. The 1st Respondent is described as an Internet Expert that usually powers all information posted on the internet/web owning and controls major platforms through which information is carried on the internet while the 2nd and 3rd Respondents are bloggers and information carriers who post information/news via the internet/web with the help of the 1st Respondent.

The Applicant was charged before a Lancashire Court in the United Kingdom for an assault in the year 2015 and was sentenced to an 8-month jail term which said jail term ended in the same year 2015. It is stated that during the period of his arrest and arraignment the news was spread on the web and social media by the Respondents and some other bloggers. It is further stated that the 1st respondent is the one who owns and controls the platforms on which the news and the information is posted on the web by the 2nd respondents and other bloggers.

The Applicant further stated that in spite of having served his jail term and been released, the news of his arrest, arraignment and imprisonment is still circulated on the web and is accessible to everyone throughout the world on any search of his name in the google search platform which is the 1st Respondent platform. As a result, all efforts to get a job or assistance from anyone have been frustrated due to the information/news of his past/criminal charge and pictures remain accessible to the whole world on the website. A copy of the news/information of the criminal charge as posted on the web by the respondents is stated to be attached and marked Exhibit A. He has been unable to move out of his house or cater for his family as the news has

continued to stigmatize him. In a bid to get the 1st respondent to block and remove the news and information regarding the criminal past, the applicant had engaged a Solicitor to write to the 1st respondent, which he did via email. Exhibit B is allegedly a copy of the said letter. The 1st respondent, it is further stated, despite receiving the letter has refused to block and remove the information and news regarding his past criminal charge on the web and in response demanded a court order before it could do as requested. Exhibit C is purportedly a copy of the 1st respondent's reply.

The applicant has stated that by the non-action of the respondents his right to privacy and dignity of person have been threatened and violated as the Respondents and particularly the 1st respondent has the technical know-how to block and remove the 2nd and 3rd defendant's and other bloggers as they are all connected to the 1st Respondent's platform. The Applicant further stated that the failure of the 1st Respondent to block all news about his past imprisonment has subjected him to jeopardy as he was almost frustrated to commit suicide.

The 1st Respondent in their Counter affidavit have denied all allegations. The deponent to the 1st respondents counter affidavit, one Anthony Nichols, has denied all the averments in the supporting affidavit stating that the 1st respondent is an American multinational technological company, a subsidiary of Alphabet Inc and operating the Web search engine called google search and the platform called Blogger. The deponent has detailed how the web works and how google search enables individuals to find relevant web pages and does not control, promote, or endorse any web search result. In a nutshell, the deponent has stated that the web pages complained of were not authored by the 1st respondent as they are not the "publisher "of search results, or the pages to which they link because search results are generated automatically by Google and the pages to which they link are authored by independent third parties prior to their crawling and indexing. Search results reflect, it is stated, the content of third-party websites at the time those web sites were first crawled by the Google software.

Google it is stated further does not and cannot edit or remove third parties' web pages directly from the web as each web page is controlled by each independent third-party website. It admits that Google can stop returning to users' links on certain web pages upon a demonstrated violation of Google's policies and local laws and upon notice, this is referred to a delisting. The 1st respondent also admits it operates Blogger.com from the United States which it describes as a platform that provides tools and space for users to operate and host their independent blogs with content removal being performed on legal grounds where content violates local laws.

It denies helping the 2nd respondent or any other person post information or news via the internet or web as alleged merely acting as an internet intermediary. It is denied that the 1st respondent directly or indirectly published or disseminated the said publication or the news about the prosecution, the conviction and imprisonment of the applicant as alleged with the alleged dissemination taken by social media blogs and or third party websites, as provided by the applicant in his exhibit A. The only relation with the news published online about the applicant it is stated, is an internet search with the 1st respondent's search engine.

It is further stated that the 1st respondent is not involved with the creation of content that users post on their blogs and unless the bloggers or website owners remove the information concerning the trial, conviction, and imprisonment of the applicant from their blogs or websites, the information will continue to remain on the Web and Web users will be able to find the link upon a search. They admit advising the applicant by an email dated 23rd January 2019 to secure a court order declaring the publication of the information as illegal or violating any law to enable the 1st respondent to block the URLS from appearing on its search engine.

The deponent states further that from a review of the facts in the supporting affidavit and the exhibits attached that the applicant had been charged with a sexual assault in a Lancashire court in 2015 and convicted after a public trial for 8 months. He had been informed by the lead counsel representing the 1st respondent at a virtual meeting, details supplied that the applicant cannot expect to have privacy rights about information contained in a public record and that the alleged publication had not breached the applicants right to dignity of human person or formed a restriction or curtailment of his freedom of association. The applicant did not file any further affidavit or reply on points of law to the counter affidavit.

ISSUES FOR DETERMINATION

In the respective written address, both learned counsels have formulated the following issues. The Applicant's counsel sole issue is *Whether or not upon the facts deposed to in the affidavit in support of this application this Honourable Court can grant the Orders sought*. The 1st Respondent however raised four issues:

1. *Whether on the facts and circumstances of this case, the Applicant has made out a case for the breach of his rights to privacy, freedom of association and right to dignity of human person to be entitled to the reliefs sought.*
2. *Whether if the Court were to find that the Applicant's rights to privacy, freedom of association and the dignity of his person were breached, it*

could be said that the 1st Respondent was responsible for the breach in the circumstances of this case.

3. *Whether based on the facts and circumstances of this case the Applicant's suit against the 1st Respondent should not be dismissed or struck out for non-disclosure of a reasonable cause of action.*
4. *Whether the 1st Respondent may validly be ordered to remove or block the allegedly offending news content or information as prayed by the Applicant.*

Having carefully considered the substance of the issues formulated for determination against the facts and processes before the court however, I find that the sole issue for determination is *whether the applicant has placed sufficient evidence before the court to support the reliefs sought.* The submissions of both learned counsel have been incorporated into this judgment and shall be referred to as deemed necessary.

whether the applicant has placed sufficient evidence before the court to support the reliefs sought.

The originating process upon which the Applicant rests his case is the amended Originating Summons dated 30th of January 2020. This is the originating process adopted on the 3rd of August 2021. The foundation of the reliefs sought I find from the facts before the court is based on the allegation that the Applicant's right to his private life, association and dignity of person are being threatened and violated by the Respondents by making the information/news of his arrest, arraignment, and imprisonment accessible to the whole world on the web and social media after four years of the completion of the jail terms. The kernel of the information allegedly being posted on the internet has not stated in the supporting affidavit just that the applicant has since completed his jail term in 2015 and failure to remove all the information regarding what is termed a criminal allegation to block or restrict anybody and the whole world from further access to any news /information regarding the Applicant's criminal allegation of 2015 via the website on the search of his name, despite a written request to the 1st respondent to do so, has violated the fundamental rights so stated. It is only upon a careful reading of the 1st respondents counter affidavit that I found the substance of the criminal information stated to have been published as being that the applicant had been charged with a sexual assault in a Lancashire court in 2015 and convicted after a public trial for 8 months. As there is no further affidavit to refute this allegation it can be taken as admitted by the applicant I hold.

The 1st respondent as stated from a summary of the facts contained in their counter affidavit, have refuted all the allegations submitting that the

complaint raised by the applicant does not touch on any violation of the applicant's fundamental rights as alleged. In the written submissions in a nutshell, it is submitted that the applicant has failed to make out a case for breaches of his right to privacy, freedom of association and right to dignity of his human person. It is also submitted that the records of identified criminal offenders are of public interest and public relevance to enable unsuspecting members of the public to have unrestricted access to such a person's criminal history. Having alleged the breach of the fundamental rights, the applicant it is submitted must place sufficient evidence before the court to establish it.

It is not sufficient evidence I hold, for the applicant to just state that his rights have been violated, there must be cogent evidence placed before the court to support the reliefs being sought. The evidence being relied upon to support the facts in the supporting affidavit are clearly Exhibits A, B and C, especially Exhibit A, the alleged offending article circulating on the internet allegedly made available to the world at large by the 1st respondents search Engine, has to be placed before the court to enable the court to reach a just determination. This was not done.

Upon a careful consideration of the amended originating processes, I found that there were no exhibits attached as referred to in the supporting affidavit, exhibit A described as a copy of the news/information of the applicant's criminal charge as posted on the web by the respondents; Exhibit B described as a copy of the applicants Solicitors letter and Exhibit C, purportedly a copy of the 1st respondents reply to the applicants solicitor's letter. These exhibits were clearly attached to the 1st respondent's copy of the originating processes since they referred to them in the counter affidavit, but they are not before the court.

The fulcrum of this suit from the facts in the supporting affidavit, are the contents of Exhibit A I hold. Without it being exhibited there is nothing to support the reliefs being sought. It is this document which the applicant has stated at paragraph 8 of the supporting affidavit that contains the news/information of the criminal charge complained about stated to have been posted on the web. I also hold in addition that there is also nothing before the court to show the existence of any cause of action against the 1st respondent especially with the absence of a further affidavit being filed. The applicant by not refuting the 1st respondent's facts stated in the counter affidavit that they were not responsible for the information posted about his arrest and arraignment by a further affidavit, being a search engine has not shown how the 1st respondent has wronged him I hold by violating the fundamental rights allegedly violated. It is the law that a person cannot sue someone who has done him no wrong **SEE REBOLD INDUSTRIES LIMITED V**

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MAGREOLA & ORS (2015) LPELR-24612 (SC) and it is settled law that facts not denied are deemed admitted.

In the absence of any documentary evidence before the court to support the reliefs sought that the 1st respondent made available facts of the applicant's arrest, arraignment, and imprisonment accessible to the whole world on the web and social media, 4 years after completing his jail term, and thereby violating the applicant's rights to a private life, association and dignity of person, I find and hold that there is nothing to support the reliefs sought. This amended Originating Summons dated 30th January 2020 is hereby dismissed.

I shall hear counsel on costs.

HON. JUSTICE I.O. AKINKUGBE (MRS)
JUDGE
26TH OCTOBER 2021

HIGH COURT OF LAGOS STATE
Sign: Date:
CASH OFFICE, IKORODU.

APPEARANCES
S. M. ILEGIEUNO FOR THE 1ST RESPONDENT

COSTS AWARDED IN THE SUM OF N150, 000 (ONE HUNDRED AND FIFTY THOUSAND NAIRA) IN FAVOUR OF THE 1ST RESPONDENT

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GBOSE TOLA
Chief Executive Officer

GBOSE TOLA
Chief Executive Officer

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON WEDNESDAY THE 23RD DAY OF JUNE, 2021
BEFORE HIS LORDSHIP, THE HONOURABLE
JUSTICE J.O. ABDULMALIK
JUDGE

SUIT NO: FHC/IB/CS/101/2020

BETWEEN:

INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA .....APPLICANT
(For themselves and on behalf of their members in Ibadan, Oyo State)

AND

NATIONAL BROADCASTING COMMISSION.....RESPONDENT

RULING

By way of a Notice of Originating Motion for the enforcement of fundamental rights to freedom of expression, the Applicant prayed as follows:-

i. *A DECLARATION that the Respondent's arbitrary act of sanctioning and imposing fine of Three Million Naira (₦3,000,000) on each of ARISE TV, CHANNELS TV and AIT*

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
ON WEDNESDAY THE 23RD DAY OF JUNE, 2021
BEFORE HIS LORDSHIP, THE HONOURABLE
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purportedly in line with Sections 5.6.3 and 5.6.9 of the Nigeria Broadcasting Code creates a chilling or stifling effect on freedom of expression and is likely to interfere with the right of the Applicant's members to freedom of expression, particularly, their right to receive ideas and information without interference as guaranteed by ***Section 39*** *of the* ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** *and* ***Article 9*** *of the* ***African Charter on Human and Peoples Rights (Ratification and Enforcement)***

ii. *A DECLARATION that the fine of Three Million Naira (₦3,000,000) imposed on each of ARISE TV, CHANNELS TV and AIT indeed constitutes an interference to the Applicant's members' right to freedom of expression particularly, their right to receive ideas and information without interference guaranteed by* ***Section 39*** *of the* ***Constitution of the Federal Republic of Nigeria 1999 (as amended*** *and* ***Article 9*** *of the* ***African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004***.

iii. *A DECLARATION that the Respondent not being a judicial body lacks the power to impose fines on any broadcaster, including fines imposed on ARISE TV, CHANNELS TV and AIT and the imposition of such fines is null and void.*

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iv. *CONSEQUENTIAL ORDER of setting aside the fine of Three Million Naira (₦3, 000,000) imposed on each of ARSE TV. CHANNELS TV and AIT as same was unlawfully imposed.*

v. *PERPETUAL INJUNCTION restraining the Respondent, its officers, agents and/or representatives from imposing sanctions or fines or excessive, disproportionate, unlawful and indeed unconstitutional restrictions on television stations including ARISE TV, CHANNELS TV, AIT and other television or radio stations which will interfere with the Applicant's members' right to freedom of expression, particularly, their right to receive ideas and information without interference.*

vi. *AND SUCH OTHER ORDER (S) as this Honourable Court may deem fit to grant in the circumstance.*

This application is predicated on the following grounds:-

a. *By virtue of* ***Section 46*** *of the* ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)****, any person who alleges the infringement or likelihood of infringement of their fundamental human rights as guaranteed by the constitution can approach this court for redress.*

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b. *By virtue of* ***Section 39*** *of the* ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** *and* ***Article 9*** *of the* ***African Charter****, the Applicant and its members are entitled to enjoy right to freedom of expression, particularly, their right to receive ideas and information from televisions including ARISE TV, CHANNELS TV and AIT without interference.*

c. *The arbitrary act of sanctioning and imposing fines of Three Million Naira (₦3,000,000) each on ARISE TV, CHANNELS TV and AIT has created a chilling or stifling effect on freedom of expression and is likely to infringe upon the Applicant and its members' right to freedom of expression, particularly, their right to receive ideas and information without interference.*

d. *The arbitrary act of sanctioning and imposing fines of Three Million Naira (₦3,000,000) each on ARISE TV, CHANNELS TV and AIT has created a chilling or stifling effect on freedom of expression and has indeed infringed upon the Applicant and its members right to freedom of expression, particularly, their right to receive ideas and information without interference.*

e. *The imposition of sanction and fine of Three Million Naira (₦3, 000,000) each against ARISE TV, CHANNELS TV and AIT contravenes the provisions of Section 15.2.2 and other provisions in the Nigeria Broadcasting Code relating to sanctions and fines and the doctrine of fair hearing.*

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f. *The process of sanctioning and imposing fines on ARISE TV, CHANNELS and AIT contravened the constitutional doctrine of fair hearing.*

g. *The Respondent is not a judicial body and so lacks the power to impose fines.*

h. *The sanction and fine of Three Million Naira (₦3,000,000) each against ARISE TV, CHANNELS TV and AIT are not permissible restrictions to freedom of expression of the Applicant's members, particularly, their right to receive ideas and information without interference in a democratic society.*

i. *The Applicant brought this suit herein to enforce their fundamental rights to freedom of expression guaranteed by* ***Sections 39*** *of the* ***Nigerian Constitution 1999 (As amended)*** *and* ***Articles 9*** *of the* ***African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004***.

In support of the application, the applicant placed reliance on a Statement which sets out the name and description of the applicant, the reliefs sought, and grounds for the reliefs sought. Also annexed to the application is an affidavit of eighteen paragraphs, deposed to by Mercy Abudu, an officer of the

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Applicant. In addition to the this application are four exhibits marked in same numerical order, to wit, Applicant's Certificate of Incorporation, the relevant parts of the Nigeria Broadcasting Code, the computer generated evidence of the communication of the sanction and the fine titled "NBC fines ARISE TV, Channels, AIT over unprofessional coverage of #EndSARS protest", computer generated evidence of the communication of the sanction, titled "Coverage of Crises and Responsibility, along with a Certificate of Compliance dated 2nd day of November 2020.

In opposition to this application, the Respondent raised and filed a Notice of Preliminary Objection which seeks thus:-

1. *AN ORDER striking out and/or dismissing in its entirety, the suit filed by the Applicant/Respondents herein for want of competency, as the suit is speculative, an academic exercise, hypothetical, discloses no reasonable cause of action against the Respondent/Applicant, constitutes a gross abuse of Court.*

2. *AN ORDER of this Honourable Court striking out this suit with cost for lack of Jurisdiction.*

3. *AN ORDER striking out the suit or setting aside the proceeding for lack of locus standi.*

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4. *AN ORDER striking out the suit for non-fulfilment of condition precedent to the hearing of the Applicant application for this Honourable Court lacks the requisite jurisdiction to entertain same.*

5. *AND FOR SUCH FURTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstances of this cases.*

The Principal Executive Officer 1(Monitoring) of the Respondent deposed to a six paragraphed affidavit and in accordance with the **Fundamental Rights (Enforcement Procedure) Rules 2009**, filed a counter affidavit which contains twenty eight paragraphs. In response to the Notice of Preliminary Objection and the counter affidavit, the Applicant filed a Written Address and a Reply on Points of Law respectively. Both learned counsel to the Applicant and Respondent adopted their written addresses on 28th day of January 2021 as their submissions for and against their respective positions taken in this suit.

Before, I delve into the facts presented by both parties, it is pertinent not to take for granted the trite knowledge of the JUSUN strike which commenced on 6th day of April 2021, but I find it needful to state that the JUSUN not only crippled Judicial activities in the country at large, but in addition, hampered the speedy delivery of this decision herein, this suit. Be that as it may parties have re-adopted their written addresses again.

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Back to the Respondent Notice of Preliminary Objection raised, the two issues formulated reads thus:-

1. *Whether this Honourable Court has the requisite jurisdiction and/or competence to entertain matters that border on and float in the realm of speculation, when there is no scintilla of credible evidence in support of, or to prove the allegation contained therein.*

2. *Whether the Applicants/Respondents' suit disclose any reasonable cause of action against the Defendant/Applicant and same is not liable to be struck out or dismissed.*

Mr. Akinkunmi Adekola, learned counsel for the Respondent/Applicant submits that the by virtue of **Order 2 Rule 4** of the **Fundamental Rights Enforcement Procedure Rules (FREP Rules) 2009**, the Applicant, not being directly affected by the act complained of, in this suit, do not have the locus to initiate this action, save on cogent reasons. He relied on the case of **Adefila & Anor v POPOOLA & Ors (2014) LPELR-22468 (CA).** He submits that the law relating to fundamental rights are those rights which have been recognised in the Constitution and which rights promotes that basic human entitlement. He maintained that by virtue of **Section 45** of the **Constitution Federal Republic of Nigeria**, that jurisdiction is

conferred on the Respondent/Applicant to regulate and control the broadcasting industry in Nigeria. He contends that this Court lacks the jurisdiction to entertain this suit. Learned counsel relied on the case of **Marva & Ors v Nyako & Ors (2012) LPELR-7837 (SC).**

Finally, learned counsel for Respondent/Applicant drew court's attention to the fact that the Applicant/Respondent failed to attach a verifying affidavit as prescribe in **Order IX Rule 10** of **Fundamental Rights (Enforcement Procedure) Rules 2009**. He urged Court to strike out this suit with substantial cost.

In opposition to the Notice of Preliminary Objection, the learned counsel referred Court to the case of **Babalola v Attorney General of the Federation (2018) LPELR-43808 (CA)** and a plethora of judicial cases in response to the first issue presented. He submits that the issue of locus standi is not applicable to fundamental rights suits.

On the second issue, to wit, the alleged non existence of a reasonable cause of action, he referred Court paragraphs 6 to 16 of the affidavit in support of the Originating application. He contends that the Applicant's members rights to freedom of expression have been interfered with and that suffices to ground this action. He cited **FRN v Abacha (2014) LPELR-22355 (CA).** He urged Court to dismiss the preliminary issues raised.

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RESOLUTION OF RESPONDENT/APPLICANT'S NOTICE OF PRELIMINARY OBJECTION:-

The late delivery of this decision is solely predicated by the JUSUN strike which commenced on 6th April 2021. Nevertheless, parties re-adopted their submissions filed in both interlocutory action and substantive suit.

ISSUE ONE:

Locus standi as it borders on actions commenced under **Fundamental Rights (Enforcement Procedure) Rules 2009,** is no longer an issue sufficient to bar the institution of fundamental rights cases. This principle was broadened by the Supreme Court in **Fawehinmi v. Akilu (1987) 4 NWLR (pt.67) 797,** wherein the Court held that:-

"it is the universal concept that all human beings are brothers assets to one another" Per Eso, J.S.C,(as he then was)

In furtherance of that salient principle in law, **paragraph 3(e)** of the preamble of the **Fundamental Rights (Enforcement Procedure) Rules 2009** captured its essence and stipulates as follows:-

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(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential Applicant. In human rights litigation, the applicant may include any of the following:

(i) Anyone acting in his own interest;
(ii) Anyone acting on behalf of another person;
(iii)Anyone acting as a member of, or in the interest of a group or class of persons;
(iv) Anyone acting in the public interest, and
(v) Association acting in the interest of its members or other individuals or groups"

Without dissipating much energy, I hold that the Applicant/Respondent have the locus standi to institute this suit against the Respondent/Applicant. Therefore, this Court have the necessary jurisdiction to determine this suit.

ISSUE TWO:

Before I resolve the issue of whether the Applicant/Respondent suit discloses a reasonable cause of action, it is pertinent to settle the issue of non fulfilment of condition precedent to the hearing

of this suit formulated by Respondent/Applicant in his Notice of Preliminary Objection. Precisely, a close study of **Order 2 Rule 1** to **5** of **Fundamental Rights (Enforcement Procedure) Rules 2009,** do not provide for the filing of a verifying affidavit by an Applicant as a condition precedent before the commencement of a fundamental right case. I shall reproduce the exact provisions thus:

ORDER 2:

1.

Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress:

Provided that where the infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the State shall have jurisdiction. Form No. 1 in the Appendix may be used as appropriate.

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2.

An application for the enforcement of the Fundamental Right may be made by any originating process accepted by the Court which shall, subject to the provisions of these Rules, lie without leave of Court.

3.

An application shall be supported by a Statement setting out the name and description of the Applicant, the relief sought, the grounds upon which the reliefs are sought, and supported by an affidavit setting out the facts upon which the application is made.

4.

The affidavit shall be made by the Applicant, but where the Applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the Applicant, stating that the Applicant is unable to depose personally to the affidavit.

5.

Every application shall be accompanied by a Written Address which shall be succinct argument in support of the grounds of the application.

This observation was also held by the Court in the case of **Groner & Anor v EFCC (2014) LPELR-24466 (CA),** as follows:

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"In my view, what is important in the Rules is that the affidavit in support of the application be made by the applicant except he is in custody or unable to swear to it. The issue here is why the 2nd Applicant (appellant) failed to personally swear to the affidavit. It is immaterial whether it is an affidavit simplicita or a verifying affidavit". Per AKOMOLAFE-WILSON, JCA (Pp. 11-16, paras. F-D).

I therefore discountenance learned counsel for Respondent/Applicant's contention in this regard because, the records shows that the Applicant/Respondent filed an eighteen paragraphs affidavit in support of his Originating process. That suffices in law.

Now to the issue of whether this suit is competent? The learned counsel for Respondent/Applicant contends that this suit is speculative, an academic exercise, hypothetical, discloses no reasonable cause of action against the Respondent/Applicant and constitutes a gross abuse of court's process. It is trite in law that when an issue such as this is in contest, it is the Originating process that a Court looks at to decide the issue one way or the other. See **Tunyan& Ors v Agagu & Ors (2015) LPELR-25801. (CA).**

I have carefully studied the Originating process and the affidavit in support of the application. Of particular importance are paragraphs **12** to **15.** I shall reproduce an extract, as follows:

"12. That upon coming across the news of the sanction and fine of Three Million Naira (₦3,000,000) imposed on ARISE TV, CHANNELS TV and AIT, some of the Applicant's members expressed fear of censorship and likelihood of infringing upon their right to receive ideas and information.

13. In particular, a member of the Applicant, Morisola Alaba had on 27th October, 2020 notified me that she received a video of a dramatic scene in Oshodi Area of Lagos State that day and that she had sent it to Channels TV for broadcast during the EYE WITNESS Report Session of Channels TV News and requested me to watch the video as I would learn something interesting about our society and the role of lawyers. Sadly, the video was not played by Channels TV News throughout that day, nor was it played the following day.

14. The EYE WITNESS Report is a part of Channels TV's broadcast where photographs and videos are received from members of the public and are shown or played to educate the general public by imparting ideas and information. The Applicant's members like many members of the public found this segment of the Channels TV production highly educative like other programs.

15. Morisola told me on phone on 29th October, 2020 and I verily believed her that it must have been the sanction and fine imposed on Channels TV by the Respondent alongside ARISE TV and AIT

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that made Channels TV not to broadcast the Video she sent for EYE WITNESS REPORT."

After due consideration of the Originating process and its affidavit in support, I find the facts on which the reliefs are sought are speculative and do not yield for sound reasoning, how the fundamental rights of the Applicant have been encroached upon.

The pith of the Applicant's alleged breach of their fundamental rights is predicated on speculation. For emphasis paragraph 15 of the affidavit reads again:-

15. Morisola told me on phone on 29th October, 2020 and ***I verily believed her that it must have been the sanction and fine imposed on Channels TV by the respondent alongside ARISE TV and AIT that made Channels TV not to broadcast the Video she sent for EYE WITNESS REPORT."***

Flowingly, I firmly hold that a legal action cannot be based speculation, to allow that, will be tantamount to an academic exercise and an abuse of court's process. In **AfriBank Nig. Plc v Homelux Construction Company Ltd & Anor (2008) LPELR-9020 (CA),** the Court held that:

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"A Court cannot decide issue on speculation no matter how close what it relies on may seem to be to the facts. Speculation is not an aspect of inference that may be drawn from facts that are laid before the Court. Inference is reasonable from acts whereas speculation is a mere variant of imaginative guess which, even when it appears plausible will never be allowed by a court of law to fill any hiatus in the evidence before it."
Per PETER-ODILI, JCA (P. 31, paras. A-C)

Conclusively, I adjudge that case of the Applicant is purely academic, devoid of any reasonable cause of action, incompetent and if allowed to proceed to hearing, it will amount to an abuse and waste of Court's process. Accordingly, I strike out this suit in its entirety.

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HON. JUSTICE J .O. ABDULMALIK
(PRESIDING JUDGE)
23/6/2021

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Parties: Absent.

Appearance: Boluwatife Sanya Esquire for Applicant.

- Akinkunmi Adekola Esquire for Respondent.

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IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON THURSDAY, THE 26TH DAY OF AUGUST, 2021
BEFORE HIS LORDSHIP, HON. JUSTICE J.T. TSOHO
CHIEF JUDGE

SUIT NO: FHC/ABJ/CS/1520/2020

BETWEEN:
ULOKO RACHAEL OCHANYA — APPLICANT

AND

INSPECTOR GENERAL OF POLICE — RESPONDENT

JUDGMENT

The Applicant by Originating Summons dated 6/11/2020 but filed on the13/11/2020 is seeking the enforcement of her fundamental rights the reliefs as contained in the Statement Accompanying the application are as follows:

1 A DECLARATION that the Respondent's officers' harassment and damage of the Applicant's mobile phone during the End SARS protest in Abuja interfered with the Applicant's right to freedom of expression and the press guaranteed under

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Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

2. A DECLARATION that the Respondent's officers harassing and physically assaulting the Applicant during the End SARS protest in Abuja interfered with the Applicant's right to dignity of person.
3. A DECLARATION that the Respondent's officers by dispersing the Applicant's and other protesters with teargas and water interfered with the Applicant's right to freedom of peaceful assembly
4. GENERAL DAMAGES in the sum of N10, 000, 000 (Ten Million Naira) as compensatory damages for the violation of the Applicant's fundamental rights.
5. AND FOR SUCH OTHER ORDERS as this Court may deem fit to give in the circumstances.

The Grounds for seeking the reliefs are stated thus:

1. The Applicant is a Nigerian citizen and resides at the Federal Capital Territory Abuja.
2. The Respondent is the Head of the Nigerian Police Force, a Government Law Enforcement Agency saddled with the responsibility of providing security, peace and stability in the country.

3. Officers of the Respondent on the 11th day of October, harassed, intimidated, threatened, assaulted and further damaged the mobile phone of the Applicant which the Applicant was using to take photographs and record the peaceful #End SARS protest thereby exercising her right to freedom of expression guaranteed under Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) thereby causing bodily harm to the Applicant and damage of the Applicant's property.
4. The Applicant on the said day was only exercising her fundamental rights guaranteed by Sections 39, 40 and 46 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
5. The Officers of the Respondent in a bid to carry out their constitutional duties clearly refused to obey the provisions of Sections 34(1) (a), 39 and 40 of the CFRN 1999 (as amended).
6. Sections 34(1)(a), 39 and 40 of the CFRN guarantees and provides for the Fundamental Right to dignity of person, right to Freedom of

Expression and the Press and right of Freedom of Assembly.

The application is supported by a 17 - paragraph Affidavit deposed to on 13/11/2020 by Charles Eshiet a Legal Practitioner with Digital Rights Lawyers Initiative with the consent and authority of the Applicant and that of his employer. Attached to the application are documents marked as Exhibits 1-3. There is also a Written Address dated 6/11/2020. The Applicant equally filed Affidavit of Non Multiplicity of Actions and Certificate of Compliance with Section 84 of the Evidence Act, 2011.

It is important to note that this Suit is not contested. The Respondent was served with the originating process and also served with several Hearing Notices, but has refused to appear in this matter and has not filed any response to this case.

In the Written Address, the Applicant formulated a single issue for the determination of this Court, to wit:

"Whether or not the Applicant is entitled to all the reliefs sought?"

The Applicant first made reference to the Affidavit in support of her fundamental rights application to show how

the Respondent intimidated, assaulted and dehumanized her contrary to the right to freedom of expression and the press as guaranteed under Section 39 of the Constitution.

She submitted that Freedom of Expression is one of the most important human rights for every human being irrespective of gender, race, tribe, creed or nationality. Cited ***Dim v. African Newspaper Limited (1990) 3 NWLR (Pt. 139) at page 392 per Karibi Whyte, JSC.***

That Nigerian Courts have decided in a plethora of cases that the rights to freedom of assembly and association are the bone of any democratic Government. Referred to ***I.G.P v. A.N.P.P. (2007) 18 NWLR (Pt.1066) 457 at 496 paras C-E. For the definition of freedom, the Applicant*** cited ***Ugwu v. Ararume (2007) ALL FWLR (Pt. 377) 815***. The Applicant made reference to paragraphs 4 to 13 of the supporting Affidavit to show how she was expressing her opinion on the activities of SARS as a citizen and journalist within the ambit of the law before the Respondent's officers restricted her right to freedom of expression when they damaged her phone while she was recording the peaceful protest #End SARS# with her phone. Cited ***I.G.P v. A.N.P.P. (2007) LPELR- 8932 Per Adekeye JCA***. She submitted further that she has always

exercised her right to freedom of expression by capturing the peaceful #End SARS# with her Iphone and imparting them to the public Via her Twitter handle @Ochanya R before she was assaulted by the officers of the Respondent.. Referred to paragraphs 14-15 of the supporting Affidavit.

The applicant urged the Court to hold that the arbitrary, unlawful and willful act of damage of the Applicant phone by the officers of the Respondent is unlawful, unjustifiable and unconstitutional interference of her right to freedom of expression.

In conclusion, the applicant urged the Court to grant the reliefs as sought in the Originating Summons.

I find it appropriate to start by stating that it is an elementary but fundamental principle of our adversarial system that an applicant is bound by the prayers in his application. See ***A.C.B. LTD. V. A.G. NORTHERN NIGERIA (1969) N.M.L.R. 231***

It seems pertinent to me to observe that the reliefs sought by the applicant in this case are largely declaratory orders. Very prominent among these is the fact that the applicant alleged the breach of her right to freedom of expression, right to dignity and right to freedom of peaceful assembly.

For ease of reference, I reproduce the Reliefs below as follows:

1. A DECLARATION that the Respondent's officers' harassment and damage of the Applicant's mobile phone during the End SARS protest in Abuja interfered with the Applicant's right to freedom of expression and the press guaranteed under Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
2. A DECLARATION that the Respondent's officers harassing and physically assaulting the Applicant during the End SARS protest in Abuja interfered with the Applicant's right to dignity of person.
3. A DECLARATION that the Respondent's officers by dispersing the Applicant's and other protesters with teargas and water interfered with the Applicant's right to freedom of peaceful assembly
4. GENERAL DAMAGES in the sum of N10, 000, 000 (Ten Million Naira) as compensatory damages for the violation of the Applicant's fundamental rights.
5. AND FOR SUCH OTHER ORDERS as this Court may deem fit to give in the circumstances.

The originating summons of the Applicant in this case ordinarily seems founded on fundamental rights issues requiring only statutory and constitutional interpretation. Admittedly, the applicant has raised constitutional questions but which in my humble opinion, are hinged on alleged harassment, physical assault and damage to her mobile phone suffered at the hands of officers of the Respondent on 11/10/2020 during the End SARS protest in Abuja.

Relief 4 however being for compensatory damages of 10 Million Naira appears to be the consequential claim.

The declaratory reliefs that the applicant seeks, by their very nature place the onus of proof on the Applicant. It is the law that declaratory reliefs are only granted when credible evidence has been led by the person seeking the declaratory reliefs. The person seeking the declaratory reliefs must plead and prove the claim for declaratory relief without relying on the evidence called by the defendant. A declaratory relief will not be granted even on admission by the defendant. See ***ANYARU V. MANDILAS LTD (2007)4 SCNJ 288 AND MATANMI & ORS V. DADA & ANOR (2013) LPELR 19929". –PER J. S. ABIRIYI, J.C.A***

In **GOVERNMENT OF GONGOLA STATE V. TUKUR (1989) 4 N.W.L.R. (PT. 117) 592** the Court held that a declaratory order merely declares a legal situation or rights or relationship. It is complete in itself, the declaration being the relief. It does not order anyone to do anything.

Bearing those principles in mind and having regard to all the circumstances of this case, I now turn to the facts.

Crucially, Originating Summons is to be used when it is required by a statute, where a dispute which is concerned with matters of law and where there is unlikely to be any substantial dispute of facts. Hence, Originating Summons would be ideal if there is no likelihood for dispute of facts. Suffice it to state that this presupposes that an applicant would amply furnish facts and evidence to leave no room for doubt as to the circumstances of her case.

In the 17- Paragraph Affidavit of Counsel for the Applicant deposed in support of the Originating Summons, only Paragraphs 13 and 14 of the Affidavit of Charles so slightly address the facts. For their worth, those relevant paragraphs read as follows:

13) **On the 11th day of October 2020, the Applicant again joined the peaceful protest**

as usual and exercised her fundamental rights to peaceful assembly and freedom of expression and the press as guaranteed by the Constitution of the Federal Republic of Nigeria. 1999 (as amended).

14) On the same 11th day of October 2020, while the peaceful protest in a bid to post same on her social media handle as report of the events, some officers of the Respondent pounced on her and viciously damaged her Iphone 11. Pleaded and marked as "Exhibit 2" is the picture of the Applicant's damaged phone.

In my opinion, I cannot see any substantial factual matrix directly linking up to any violation of the fundamental rights as alleged. Not at least as alleged against the Respondent.

It is clear that the first three declarations 1, 2, 3 which relate to fundamental rights are evidently declaratory of the issues as contained therein.

The power of a court of record to make a declaration where it is only a question of defining rights of two parties is almost unlimited. This court retains the power to declare

contested legal rights, subsisting or future, of the parties represented in the litigation before it. See ***OBI v I.N.E.C. (2007) 11 NWLR (PT. 1046) 560 (P. 36, PARAS. F-H).*** It is acknowledged however that human rights litigation can be instituted on behalf of another person. See Paragraph 3(e) of the Preamble to the Fundamental Rights Enforcement Procedure Rules, 2009.

The Supreme Court stated in the case of ***DUMEZ NIG. LTD. V NWAKHOBA (2008) 18 NWLR (1119) 361 @ 376 A – E,*** thus: "The burden of proof on the applicant in establishing declaratory reliefs to the satisfaction of the court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the defendant where the applicant fails to establish his entitlement to the declarations by his own evidence. In the present case, it relatively goes to mean that the reliefs sought by the applicant cannot be made on admission or in default of pleading by the Respondent. See ***VINCENT I. BELLO V MAGNUS EWEKA (1981) 1 SC 101; MOTUNWASE V SORUNGBE (1988) 5 NWLR (1992) 90 AT 102; OGOLO V OGOLO (2006) ALL FWLR (313) 1 @ 13 – 14; (2006) 5 NWLR (972) 163 @ 184 D – E.***

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For the abundance of caution, it is always good to place enough evidence for the court to evaluate even when it amounts to surplusage of proof. This court would have no qualms granting declaratory reliefs if only the court was satisfied by evidence. As it stands, I am not satisfied as to when, where, by whom and how the circumstances of the applicant's case came about. Exhibit 1 being printouts of some of the applicant's posts on twitter are vague, if not at large. Exhibit 2 being the printout image of a damaged mobile phone is also not good evidence of what it portends. There is no indication as to the time when that image was derived. It cannot therefore be safely placed within the time frame alleged. Then again, there is nothing pointedly tying the applicant to that phone. I suppose that a purchase receipt could have sufficed.

Moving on to Exhibit 3, it would seem that the same challenges that the Exhibit 2 has suffered are shared in common. The applicant pleaded the picture to show the bruises and injury she sustained following assault by the Respondent's officers. But by itself, the image does nothing to proof what it is supposed to. There is no indication as to when that image was taken. To put it bluntly, the image has

failed to prove what is in the place of a medical report to prove. The Court cannot rely on speculative evidence.

The law is settled that the applicant must satisfy the court by cogent, credible and convincing evidence, that she is entitled to the declaratory reliefs as sought. So, as the applicant by her own evidence has failed to prove her claim for declaration, her claim must fail. See ***AYANRU V. MANDILAS LTD, (2007) 10 NWLR (PT. 1043) 462; NDAYAKO V. DANTORO (2004) 13 NWLR (PT. 889) 187***. And I so hold.

The Applicant's Suit is consequently struck out.

HON. JUSTICE J. T. TSOHO
CHIEF JUDGE
26/08/2021

Parties absent.

Clifford Kalu Esq. for the Applicant.

THE COMMUNITY COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) V. FEDERAL REPUBLIC OF NIGERIA

Application No: ECW/CCJ/APP/23/21 Ruling No. ECW/CCJ/RUL/03/21

RULING

ABUJA

22 June 2021

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) ... **APPLICANT**

V.

FEDERAL REPUBLIC OF NIGERIA ... **RESPONDENT**

COMPOSITION OF THE COURT:

Hon. Justice Gberi-Be OUATTARA - Presiding

Hon. Justice Keikura BANGURA - Member/Rapporteur

Hon. Justice Januaria T. Silva Moreira COSTA - Member

ASSISTED BY:

Mr. Athanase ATANNON - Deputy Chief Registrar

REPRESENTATION OF PARTIES:

Femi FALANA, SAN Oluwadare A. KOLAWOLE Opeyemi OWOLABI	Counsel for the APPLICANT
Maimuna LAMI SHIRU (MRS.) Enock SIMON Abdullahi ABUBAKARR Suleiman JIBRIL Olatayo AFOLABI	Counsel for the RESPONDENT

I. RULING:

1. This is the ruling of the Court delivered virtually in open court pursuant to Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

II. DESCRIPTION OF THE PARTIES

2. The Applicant is the Socio-Economic Rights and Accountability Project (SERAP) a Non-Governmental Organization registered and situated in the Federal Republic of Nigeria (hereinafter referred to as the "Applicant").

3. The Respondent is the Federal Republic of Nigeria, a Member State of ECOWAS and State Party to the African Charter on Human and Peoples' Rights and other international human rights instruments (hereinafter referred to as the "Respondent").

III. INTRODUCTION

4. The subject-matter of the case is the legality of the ban/suspension of the microblogging service, Twitter, by the Respondent and its agents on the 4th June, 2021, which has resulted in the violation of the right to freedom of expression, access to information and media freedom guaranteed by the African Charter on Human and People' Rights (African Charter) and other

international human rights treaties and conventions that the Respondent is party to.

IV. PROCEDURE BEFORE THE COURT

5. An application initiating a claim for the violation of human rights was filed by the Applicant in the Registry of the Court on the 8th June, 2021 together with an application for Provisional Measures and Instructions.

6. A Motion on Notice to bring additional documents was filed by the Applicant on the 21st June, 2021 together with an Affidavit in Support of the Motion and Written Address in Support of the Motion on Notice to bring additional documents before the Court.

7. The Respondent filed a Notice of Preliminary Objection on the 21st June 2021 together with its Written Address in Support of the Preliminary Objection. The Affidavit in Opposition to the Provisional Measures filed by the Applicant was also filed together with the pleas of fact and law on the 21st June 2021 by the Respondent. Further, the Statement of Defense and the pleas of law and fact were filed by the Respondent on the 21st June 2021.

8. The Applicant's Reply to the Respondent's Notice of Preliminary Objection was filed on the 22nd June 2021 together with the Affidavit in Support therein.

V. APPLICANT'S CASE

a) Summary of facts

9. It is the case of the Applicant that the Respondent on the 4th of June 2021 announced the indefinite suspension of Twitter in Nigeria whereupon it lodged an Application at the Court challenging the said suspension. By a separate document, the Applicant filed the instant application for provisional measures and instructions seeking the reliefs listed in paragraph 10 herein.

a) Pleas in law

10. The Applicant relied on the following laws:

i. Article 20 of Protocol A/P/1/7/91 of the Court; and

ii. Articles 79 (1) & (2) and 81 (1) & (2) of the Rules of the Court.

b) Reliefs Sought

11. The reliefs sought by the Applicant are as follows:

i. *AN INTERIM ORDER* of this Honorable Court restraining the Respondent and its agents from unlawfully imposing sanctions or doing anything whatsoever to harass, intimidate, arrest or prosecute Twitter and/or any other social media service provider(s), media houses, radio and television broadcast stations, the Plaintiff and

other Nigerians who are Twitter users, in violation of the African Charter of the on Human and Peoples' Rights and International Covenant on Civil and Political Rights, pending the hearing and determination of this suit.

ii. AN INTERIM ORDER of this court restraining the Respondent and its agents from unlawfully regulating, censoring, imposing ban, shutting down, licensing or restricting the access of the Applicant, together with those of other concerned Nigerians to the social media and the internet and every other medium of expression or anything whatsoever pending the hearing and determination of this suit.

iii. AN INTERIM ORDER of this court restraining the Respondent and its agents from harassing, intimidating, arresting and prosecuting the Applicant, concerned Nigerians and other people simply for peacefully exercising their human rights through Twitter and other social media platforms, pending the hearing and determination of this suit.

VI. RESPONDENT'S CASE

a) Summary of facts

12. The Respondent presented facts supporting its ban on the microblogging service, Twitter, claiming that the ban had been done pursuant to extant laws and in the interest of national security. It is the Respondent's submission that the suspension has in no way aggrieved individual Twitter users in Nigeria as

they are accessing their accounts vide Virtual Private Networks (VPN) in Nigeria.

b) Pleas in law

13. The Respondent relied on the following laws:

i. Section 420, 419 of the Penal Code (Northern States) Federal Provisions Act; and
ii. Section 58 of the Criminal Code Act.

c) Reliefs Sought

14. The relief sought by the Respondent is as follows:

i. An order of this Honorable Court striking out and /or dismissing this notice of registration of application for want of jurisdiction.

VII. PROCEEDINGS BEFORE THE COURT

PRELIMINARY OBJECTION

15. The Respondent in its submission objected to the application for interim measures relying on two grounds therein to wit:

a. That the subject matter of the suit is not for the enforcement of any human right recognized by this Court.

b. That this Honorable Court lacks the jurisdiction to determine the criminalization of an act under Nigerian domestic laws.

Ground one

The Respondent's case

16. The Respondent states that for the Court to assume jurisdiction it must have been conferred on it by statute or other instruments establishing the Court. That the suspension of Twitter in Nigeria is not in any way connected to any individual in Nigeria or to the Applicants. That the action of the Respondent relates to the operation of Twitter in Nigeria and not to a ban on individual users Twitter accounts. That the suspension of Twitter in Nigeria does not fall under the provisions of the African Charter or other international human rights treaties.

17. In addition, Twitter as an entity is not an organization of a Member State but an American microblogging and social media networking service on which users post and interact with messages. The violation of Nigerian domestic legislation and consequent compulsory shutdown of an entity cannot be termed as the breach of any fundamental rights recognized and enforceable by this Court.

The Applicant's Case

18. The Applicant contends that ground one and the argument in support of same cannot stand as the subject-matter borders on freedom of expression which is recognized by the African Charter on Human and People's Rights to which the

Respondent/Applicant is a party. Relying on the Court's decision in the case of AMNESTY INTERNATIONAL V REPUBLIC OF TOGO JUDGMENT NO. ECW/CCJ/JUD/09/20 at page 11, the Applicant contends that the right to freedom of expression, access to information and media freedom, which are the violations in the present suit, are directly enforceable by the Court.

19. The Applicant submitted that a legal order was created with the establishment of the ECOWAS Revised Treaty and protocols and other related commitments by State Parties as they undertook to address any violation of human rights. Therefore, the act of the Respondent which is a violation on the rights to freedom of expression, access to information and media freedom impinges on the fulfillment of the obligation of the Respondent.

20. It was also contended by the Applicant that the provisions of extant laws cannot be used to bar the jurisdiction of this Court and in the instance where there is a conflict between a State's international obligations under human rights and domestic legislation, the former prevails.

Analysis of the Court

21. The crux of the Preliminary Objection of the Respondent in ground one is that the subject matter of the suit which relates to the indefinite suspension of the Twitter is not in any way connected to any individual Nigerian or the Applicant in the suit. That the right to freedom of expression is different from freedom of reach as twitter in Nigeria is not a right recognized under any treaty enforceable by this Court.

22. The Court recalls its decision in which it made a pronouncement that access to the internet though not a right, in the strict sense, serves as a platform in which the rights to freedom of expression and freedom to receive information can be exercised. Therefore a denial of access to the internet or to services provided via the internet, as a derivate right, operates as denial of the right to freedom of expression and to receive information. This was adequately captured by the Court as follows,

> *"Access to internet is not stricto senso a fundamental human right but since internet service provides a platform to enhance the exercise of freedom of expression, it then becomes a derivative right that is a component to the exercise of the right to freedom of expression. It is a vehicle that provides a platform that will enhance the enjoyment of the right to freedom of expression. Right to internet access is closely linked to the right of freedom of speech which can be seen to encompass freedom of expression as well. Since access to internet is complementary to the enjoyment of the right to freedom of expression, it is necessary that access to internet and the right to freedom of expression be deemed to be an integral part of human right that requires protection by law and makes its violation actionable. In this regards, access to internet being a derivative right and at the same time component parts of each other, should be jointly treated as an element of human right to which states are under obligation to provide protection for in accordance with the law just in the same way as the right to freedom of expression is protected. Against this background, access to the internet should be seen as a right that requires protection*

of the law and any interference with it has to be provided for by the law specifying the grounds for such interference."

23. The above cited decision is on all fours with the instant case. The Court recognizes that access to Twitter provides a platform for the exercise of the right to freedom of expression and freedom to receive information, which are fundamental human right and any interference with the access will be viewed as an interference with the right to freedom of expression and information. By extension such interference will amount to a violation of a fundamental human right which falls within the competence of this Court pursuant to Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05) Amending the Protocol (A/P1/7/91) relating to the Community Court of Justice. Evidently, this situates the claim before the Court as one bordering on the violation of human rights which has occurred in a Member State.

24. Noting that the Respondent has also argued that its action is against a particular entity, Twitter and not the Applicant, and that the subject matter of the suit is therefore not for the enforcement of human rights, the Court is inclined to reiterate its competence. Article 9(4) of the Supplementary Protocol (A/SP.1/01/05) Amending the Protocol (A/P1/7/91) relating to the Community Court of Justice provides *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."* It is trite that a mere allegation of a violation of human rights in the territory of a Member State is sufficient, *prima facie,* to justify the Court's jurisdiction.

25. Consequently, the Court holds that it has jurisdiction to hear the application and dismisses ground one same being premised on the violation of human rights.

On ground two

Respondent's case

26. The Respondent contends that the "*...Court lacks the jurisdiction to determine the criminalization of an act under Nigerian laws.*" The argument in support of this ground is that the suspension vests directly on Twitter and not on the Applicant as neither the rights of the Applicant nor other Twitter users in Nigeria have been tampered with by the Respondent. Furthermore, that the use or operation of Twitter constitutes the offences of Importation of Prohibited Publication under Sections 420 and 421 or the offence of possession of seditious articles under Section 419 of the Penal Code (Northern States) Federal Provisions Act. In conclusion, the Respondent is within its right to prosecute in accordance with its criminal laws.

Applicant's case

27. The Applicant argues that the objection in ground two is flawed as the nature of the suit has been misunderstood by the Respondent. That the present suit is based solely on the violations of the rights to freedom of expression, access to information and media freedom which are directly enforceable before this Court pursuant to Article 9 (4) of the Supplementary Protocol of the Court. Relying on MANNEH V REPUBLIC OF THE GAMBIA JUDGMENT NO.

ECW/CCJ/JUD/03/08 and ALHAJI HAMMANI TIDJANI V FEDERAL REPUBLIC OF NIGERIA AND 4 ORS. JUDGMENT NO. ECW/CCJ/JUD/01/06 the Applicant put forward the combined effect of Article 9 (4) and Article 10 (d) of the Supplementary Protocol. That where a right recognized by the African Charter has been violated by the Respondent and there is no action pending before any other International Court with respect to the same, neither is there a laid down law that led to the alleged breach, the Court has competence to hear the such a claim.

28. Furthermore, the Applicant contends that ground two cannot succeed as the Court has ruled previously in AMNESTY INTERNATIONAL V REPUBLIC OF TOGO (supra) that *"...failure of the Respondent to provide the said law is evidence that their action was not done in accordance with the law..."* the Applicant contends that it is unfortunate that the Respondent has cited provisions of the Penal Code as basis for the ban on Twitter as same were declared illegal and unconstitutional in Nigeria by the Court of Appeal in ARTHUR NWANKWO V THE STATE (1985) 6 NCLR 228.

29. It is submitted by the Applicant that the Attorney-General of the Respondent denied the threats to prosecute and arrest violators of the ban on Twitter after he was exposed for defying the said ban. The Applicant therefore urged the Court to declare its jurisdiction to hear the application, dismiss the Preliminary Objection of the Respondent and determine the suit in favor of the Applicant.

Analysis of the Court

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30. The Court notes that the Applicant considers this ground and the accompanying argument as unfortunate as it is evident that the Respondent has misunderstood the subject matter of the application. The Applicant however, submits that the suit is premised on violations of human rights and that the said law used in support of the ground has been declared illegal.

31. What is before the Court is an application for the violation of human rights committed with the territory of a Member State and not the determination of the criminalization of an act under Nigerian laws. This Court is guided by its competence pursuant to Article 9 (4) supra and its jurisprudence that has continued to elaborate on when the Court assumes jurisdiction.

32. The construct of the ground itself by the Respondent makes apparent to the Court that the subject matter of the Application has not been understood by the Respondent. The Court is not urged to make a pronouncement on the right of the Respondent to prosecute a crime within its domestic laws but on the right to deny the enjoyment of a right through prosecution.

33. The Court finds the objection in ground two untenable and dismisses it accordingly.

VIII. APPLICANT'S APPLICATION FOR PROVISIONAL MEASURES

Analysis of the Court

On expedited procedure

34. The Applicant prayed that in view of the urgency of the matter, the Application be heard expeditiously. The request for expedited procedure is premised on the

fact that twitter is a widely used platform for receipt and dissemination of information and the ban has implications on all users including the Applicant, entrepreneurs and other private individuals. It is therefore the contention of the Applicant that issues raised demand an urgent deliberation to forestall irrecoverable economic loss and deprivation of access to information with its attendant consequences on the Applicant and millions of other Nigerian users.

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35. *"A request for expedited procedure is granted when the particular urgency of a case requires that the Court adjudicates within the shortest possible time".* (See: SOW BERTIN AGBA V REPUBLIC OF TOGO JUDGMENT NO. ECWCCJ/JUD/05/13.) The Court has cautiously considered inter alia the facts pleaded in the Application and the oral submissions by both parties, particularly the Applicant's submission which drove home the need for this Application to be heard and for the issues to be determined expeditiously. The Court having also carefully given due consideration to the nature of the case, its alleged potential global implication on users both in and out of the territory of the Respondent including the Applicant, the alleged potential financial implication on the users, is convinced that the Application ought to be determined expeditiously.

36. Consequently, the Court being persuaded by the urgency pleaded, grants the Applicant's prayer in that wise and in accordance with Rule 79 of the Rules of the Court, all timelines will be abridged as the Court deems fit.

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On other provisional measures

37. The Applicant sought the order of Court to grant Provisional Measures as enumerated in paragraph 7 supra. The Court notes that reliefs 1 & 2 speak to the same issue that is; the alleged intimidation, threat to arrest and prosecute users of twitter in Nigeria. The Court will therefore address the two reliefs collectively.

On order to restrain the arrest or prosecution of users of twitter in Nigeria.

The Applicant's case

38. The claim of the Applicant is that following the suspension of Twitter by the Respondent, the Attorney- General and Minister of Justice acting on its behalf directed the Director of Public Prosecution and other agents of the Respondent to arrest and prosecute anyone using Twitter in Nigeria.

39. In response to above directive, the Respondent through the National Broadcasting Commission, directed media houses to deactivate their Twitter accounts and discontinue its use. These actions according to the Applicant has put millions of Nigerians and the Applicant under perplexing fear and premonition of possible suspension of other means of freedom of expression such as Facebook, Instagram and WhatsApp, which has the potential of fully shutting down all social media channels, and restraining freedom of expression, access to information and media freedom in Nigeria.

40. The Applicant therefore argued that except an interim order is entered restraining the Respondent and its agents from carrying out their threat, the Respondent will breach and continuously breach the rights of the Applicant, together with those of other concerned Nigerians and any subsequent order of the Court in favor of the Applicant will be rendered nugatory. They therefore prayed that this provisional measure be granted pending the determination of the substantive application.

The Respondent's case

41. The Respondent contends that for a Court to grant an interim order, there must be evidence of a potential harm before it and that in the instant case the Applicant is not affected or harmed by the suspension of Twitter. Further , the Respondent relied on the decision of the Supreme Court of the Federal Republic of Nigeria in ADELEKE V LAWAL (2014) 3 NWLR (Pt1393) at page 5 where it stated that in the grant of an interlocutory injunction the following conditions must be apparent:

a. *An existence of a legal right;*
b. *A substantial issue to be tried;*
c. *That the balance of convenience is in favor of the party seeking the relief;*
d. *Failure to grant the injunction would cause irreparable damage or injury to one of the parties.*

42. Hinging its argument on the conditions aforementioned, the Respondent submits that the Applicant has failed to meet these conditions to warrant the grant of the interim measures prayed for in this Application and urges the Court to refuse the Application on this basis.

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Analysis of the Court

43. The Court considers that interim measures are urgent measures which, in accordance with the established practice of the Court, apply only where there is an imminent risk of irreparable damage. (See: MAMATKULOV AND ASKAROV V TURKEY [GC], nos. 46827/99 and 46951/99, &104, 4th February 2005). The import of an application for an order for interim measures is to preserve the *'res'* of the subject-matter and to forestall or prevent a harm or damage which is futuristic albeit plausible.

44. In the instant case, though the threat of prosecution has not been established to have been activated, the fear of its prospect is nevertheless real. The Court is therefore convinced that its possibility ought to be suspended pending the determination of the substantive application. The damage that may potentially arise from the prosecution and sanction for a crime, the legitimacy of which is yet to be determined by the Court is obviously irredeemable/irreparable in the event that the prosecution is declared to be unlawful. In that wise the Court ought to order that the Respondent to take certain measures provisionally while it continues its examination of the case. It is therefore appropriate to make an

order to ensure the final decision on the substantive matter or the Res is preserved to the end of the trial.

45. Consequently, the prayer of the Applicant in this wise is granted and the Respondent and its agents are hereby restrained from sanctioning any media house or harassing, intimidating, arresting and prosecuting the Applicant and concerned Nigerians for the use of twitter and other social media platforms, pending the hearing and determination of the substantive suit.

On order to lift the suspension on twitter

The Applicant's case

46. The Applicant avers that given that an Application has been lodged before the Court challenging the powers of the Respondent to suspend twitter, the instant Application seeks an interim order of the Court to lift the suspension pending the determination of the substantive application. This is premised on the fact that the Applicant who greatly relies on Twitter in the conduct of its work and millions of youth who are dependent on the use of Twitter as a sole source of income are currently negatively impacted and will continue to if the suspension is not lifted.

The Respondent's case

47. The Respondent contends that granting the application at this stage without the Applicant showing any urgency will amount to disposal of the substantive suit

which would be prejudicial to the fair trial of the substantive matter and lead the Court to delivering two judgments in one.

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Analysis of the Court

48. The Court reiterates the significance of provisional measures and reaffirms that it is a temporary stop gap to prevent the occurrence of a potential harm, injury or damage that may arise from an alleged violation of human rights. The measure is largely preventive in nature and where the perceived or anticipated damage has already occurred with the infliction of the attendant suffering, its order becomes devoid of purpose.

49. In the instant case, the suspension of Twitter allegedly took immediate effect on the day it was published that is the 4th of June 2021. The instant Application was filed on the 8th of June 2021. The alleged loss of livelihood amongst other consequential adverse effects of the suspension would already been activated and biting so to say before this Application was filed.

50. The Court having considered all the submissions made by the parties herein, is convinced that granting the Applicant's prayer to lift the suspension under the conditions stated above will amount to chasing the wind. The appropriate decision will be made upon the determination of the substantive application. The Court therefore declines to order the Respondent and his agents to lift the suspension on twitter.

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IX. OPERATIVE CLAUSE.

For the reasons stated above, the Court sitting in public after hearing both parties:

i. **Declares** that it has jurisdiction to hear and determine the Application.

ii. **Dismisses** the Preliminary Objection of the Respondent on both grounds.

iii. **Orders** that the Application be heard expeditiously.

iv. **Orders** the Respondent and its agents to refrain from imposing sanctions on any media house or harassing, intimidating, arresting or prosecuting the Applicant or concerned Nigerians for the use of Twitter and other social media platforms, pending the hearing and determination of the substantive suit.

v. **Declines** to order the Respondent and its agents to lift the suspension on the use of Twitter pending the determination of the substantive suit.

vi. **Orders** the Respondent to take steps to immediately implement the orders set above herein.

Hon. Justice Gberi-Be OUATTARA -Presiding .....

Hon. Justice Keikura BANGURA - Judge Rapporteur .....

Hon. Justice Januaria T. Silva Moreira COSTA- Member .....

Mr. Athanase ATANNON - Deputy Chief Registrar .....

Done in Abuja, this 22nd Day of June 2021 in English and translated into French and Portuguese.

Since the unprecedented incursion of technology into every aspect of human endeavours, the exercise, enjoyment and interference with human and other legal rights have also taken on another dimension. Legal rights have now migrated to the Internet and other digital platforms, hence the appreciation of the concept of 'digital rights'. This work is a lucid compilation of some major decisions on digital rights by the Nigerian courts. It is a practitioners' review of the various decisions along the line of their facts, judicial reasoning and the contributors' comments on the propriety or otherwise of the decisions.

It is cheering to note that some of the decisions reviewed in this work have not only set favourable precedents in digital rights but have also given commendable interpretations of extant legislation by our courts. This compilation is hoped to be a valuable resource to all critical stakeholders with a view to engendering robust understanding and effective protection of digital rights in every form of existence. Its objective therefore extends beyond deepening basic understanding of digital rights in Nigeria but also constituting a valuable resource in adjudication, scholarship, policy-making and legislation on digital rights. The compilation, which is the first of its kind on digital rights in Nigeria, is hereby recommended for the use of lawyers, judges, law teachers, students, legislators, policy makers and indeed everyone.

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