IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA

Suit No: NIC/EN/07/2010

Petitioner: COMRADE EUGENE UGWU
And
Respondent: MRS. BRIDGET ORJIEKWE AND OTHERS

Date Delivered: 2011-06-22

Judge(s): Hon. Justice B. B. Kanyip -Presiding Judge, Hon. Justice O. A. Obaseki-Osaghae Judge, Hon. Justice

Rulings Delivered

BEFORE THEIR LORDSHIPS
Hon. Justice F. I. Kola-Olalere - Presiding Judge
Hon. Justice O. A. Obaseki-Osaghae - Judge
Hon. Justice J. T. Agbadu-Fishim - Judge

DATE JUNE 22, 2011 SUIT NO. NIC/EN/07/2010

BETWEEN
COMRADE EUGENE UGWU - - - CLAIMANT

AND
1. MRS. BRIDGET ORJIEKWE
2. ENUGU STATE LOCAL GOVERNMENT SERVICE COMMISSION - - - DEFENDANTS

REPRESENTATION
Prince Ibe Charles, Charles Okpe, L. D. Abonyi (Mrs) and M. N. Anozie (Mrs), for the claimant.
C. A. Onoga (Mrs.) Solicitor General & Permanent Secretary Enugu State & C.M. Agboola (Miss), for the respondents.

RULING
The claimants commenced this action by written complaint dated and filed May 18, 2010. Also filed with the complaint are: the claimant's statement of facts, list of witnesses, list and copies of documents to be relied on in arguing his claims. The claimant seeks the following reliefs against the defendants in his complaint:
a. A declaration that the purported dismissal of the plaintiff is as a result of his involvement in trade union activities on the one hand and intra-union disputes between the plaintiff's faction of NULGE in Enugu Chapter and the other faction supported by the defendants on the other hand.
b. A declaration that the purported dismissal of the plaintiff is contrary to the provisions and laid down procedures of the Local Government Edict 1976 (the Local Government Staff Regulations 1978), the Public Service Rules (under which he was purportedly dismissed), the International Labour Organization (ILO) Regulations/Workers' Representatives Convention and other labour practices in Nigeria.
c. A declaration that the purported dismissal of the plaintiff from the service of the Enugu State Local Government System is null and void and of no effect whatsoever.
d. A declaration that the plaintiff has not committed any offence under the services of the Local Government System to warrant his dismissal or at all.
e. An order of court directing that the plaintiff be re-instated into the services of the Local Government of Enugu State with immediate effect.
f. An order that the plaintiff be paid all outstanding unpaid salaries and allowances from the date the payment of same was stopped and that the plaintiff be promoted and placed at the same level his counterparts in the service are and on which he would have been but for the purported dismissal.

g. An order that the plaintiff or any other NULGE unionist under the employment of the Local Government Service of Enugu State in or loyal to the plaintiff's faction of NULGE, Enugu State Chapter should not be penalized on account of involvement in labour assignments or labour disputes.
h. An order that the defendants should hand off the administration of NULGE and dispute between the two rival factions of NULGE in its Enugu State Chapter which dispute is already sub judice.
i. An order restraining the defendants from interfering with the plaintiff's services under the Local Government System of Enugu State against the backdrop of his involvement in trade Union matters.
j. N500,000,000.00 damages from the 1st defendant for allowing herself to be used to settle union scores and the embarrassment her letter of purported dismissal had caused the plaintiff.

On February 14, 2011 the defendants entered appearance. The defendants also filed, with their memorandum of appearance, their statement of defence, notice of preliminary objection and their written address in support of the preliminary objection praying this court to strike out the name of the 1st defendant as a defendant in this case for being misjoined. Particulars of the defendants' objection are:
1. The 1st defendant acted at all times bona fide in her capacity as the Chairman of the 2nd defendant.
2. That by virtue of section 59 of the Local Government Law of Enugu State. Cap. 109, Vol. V. Laws of Enugu State 2004, the 1st defendant is immune by law against any suit for any action taken bona fide in the course of her duty as the Chairman of the 2nd defendant.
3. The 1st defendant is improperly joined as a defendant in this suit in her personal capacity.

In their written address the defendants raised two issues for determination by this court thus:
i. Whether the 1st defendant enjoys legal immunity from any suit consequent upon her action as Chairman of the 2nd defendant;
ii. Whether the 1st defendant is not improperly joined to this suit in her personal capacity;

Learned counsel to the defendants, Mrs Chiemelie Onaga, Solicitor-General and Permanent Secretary Ministry of Justice, Enugu State, argued on the first issue that the Enugu State Local Government Service Commission was established by section 56 of the Local Government Laws Cap 109 Vol. V. of the Revised Laws of Enugu State 2004. The local Government Law provides for the appointment, functions, and other matters concerning the 2nd defendant. She reproduced section 59 of the Local Government Law and argued that the law provides for the immunity of members of the Commission. Learned Enugu State Solicitor-General continued that that provision is unambiguous and mandatory as to the immunity provided for the chairman and members of the commission. The reason being to allow the chairman and members of the 2nd defendant Commission enjoy freedom to carry out their functions without any intimidation of any sort from anyone.

To the defendants, the facts as alleged by the claimant are that the 1st defendant is the Chairman of the 2nd defendant, a position which she assumed in 2009. The defendants went on that as a dutiful administrator, the 1st defendant noticed the poor attitude of the claimant to his work and had reprimanded him on same but that the claimant felt that as a labour activist, he could carry out his union activities to the detriment of his job. The defendants contended that the claimant's gross misconduct took the form of total neglect of his duties and insubordination to the authority of the 2nd defendant. It was this that earned the claimant his dismissal under the Public Service Rules in the defendants' opinion.

Continuing their argument, the defendants stated that although the claimant may institute legal action being aggrieved by his dismissal, their submission is that the claimant's claim could only lie against the 2nd defendant. The defendants maintained that a look at theirs and other documents will reveal that every action of the 1st defendant on this matter was done bona fide and in her capacity as the Chairman of the 2nd defendant. The defendants continued that every action taken by the 2nd defendant as regards the claimant's dismissal is reasonably proper in the circumstance. To them, the 1st defendant cannot, by any stretch of imagination, be rightly considered to have had a personal grievance against the claimant neither is there any material before this court in support of claimant's allegation that the 1st defendant was "used as a tool to settle union scores". The defendants submitted that in the claimant's presentation of this allegation, he presented inadmissible hearsay and suspicious facts.

The defendants submitted that by the literal rule of statutory construction, where the words of a statute are clear and

unambiguous, there is a duty on the court that such words should be given their simple, plain and ordinary grammatical meaning, referring to the Supreme Court case of Adisa v. Oyinwola [2000] 10 NWLR (Pt. 674) 116 at 217 where Uwaifo, JSC stated: “when the words of legislation or Constitution are clear, plain and unambiguous, there is no need to give them any other meaning than their ordinary, natural and grammatical construction would permit unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the legislation or Constitution”. The defendants also referred to Ifzue v. Mbadugha [1984] 1 SCNLR 427 and Dapianlong v. Dariye [2007] 8 NWLR (Pt 1036) 332. The defendants urged the court to so interpret the provisions of section 59 of the local Government Law and accordingly strike out the name of the 1st defendant.

On their 2nd issue of whether the 1st defendant is not improperly joined to this suit in her personal capacity, the defendants stated that there is a distinction under Nigerian law relating to the capacity in which a person can sue or being sued. Thus a person who undertakes a suit by a representative or official capacity may not institute such suit in his personal capacity. The defendants maintained that where a person sues privately for an official right his locus standi is being called to question and that where a person is sued by virtue of a public or official duty, in his personal capacity, courts have held that such a person is improperly joined in that capacity, referring to Bamisile v. Osasuyi [2007] 10 NWLR (Pt. 1042) 225.

The defendants submitted that the Court of Appeal in Adefarasin v. Dayekh [2007] 11 NWLR (Pt. 1044) 89 at 121 stated that “Where there is a misjoinder … the court is empowered, at any stage of the proceedings, and on such terms as appear to the court to be just in the circumstance, to order that the name or names of any party or parties, whether as plaintiffs or defendants, improperly joined, to be struck out.” The defendants, as a result, strongly urged the court to hold that the 1st defendant is wrongly joined to this suit; being statutorily immune there from and having been so sued in her personal capacity. Consequently, they prayed the court to strike out the name of the 1st defendant from this suit.

Before the claimant’s counsel Charles Okpe proceeded with the claimant’s reply to the preliminary objection, he observed that the 1st defendant who is sued in her personal capacity is claiming an official status and did not pay a dime for filing her processes. Counsel went on that the 1st defendant can only be assessed as ‘official’ when she is being sued in her official capacity and not when she is sued in her personal capacity as in the present suit. It is the learned counsel’s view that the defendants did not front-load the evidence of their witness.

Opposing the preliminary objection, learned counsel to the claimant submitted that section 59 of the Local Government Law of Enugu State Cap 109 Vol. V Laws of Enugu State 2004 on which the 1st defendant anchored her objection cannot avail her in the circumstance of this case. He reproduced the section and submitted that the operating word and phase in the law are:

I. Bona fide
II. Execution of his duty.

To the learned counsel, the word bona fide literally means ‘in good faith’ and The term good faith has been defined in Black’s Law Dictionary, 8th Edition, at p. 713 as:

“A state of mind consisting in (1) honesty in belief or purpose (2) faithfulness to one’s duty or obligation (3) observance of reasonable commercial standards of fair dealing in a given trade or business or (4) absence of intent to defraud or to seek unconscionable advantage”.

Counsel submitted that a person can be said to act bona fide if he acts honestly, fairly and not deriving any unconscionable advantage. He went on to ask that, considering the totality of the claimant’s allegations in his statement of facts particularly as they concern the partisan involvement of the 1st defendant in NULGE matters to the visible prejudice of the claimant which culminated in the claimant’s alleged dismissal, did the 1st defendant act bona fide? Or, if one argues that what the claimant said in his statement of facts are mere allegations, what about the dismissal letter dated 9/12/2009 giving a retrospective effective date of 13/11/09 which retrospective date predated the date the claimant was alleged to have been issued with a query of 19/11/2009? Counsel further inquired if the 1st defendant acted honestly, fairly and conscionable when she purportedly dismissed the claimant before issuing him with a query?

In relation to the provision of the Civil Service Rules, Mr. Okpe again queried if the 1st defendant acted honestly, fairly and conscionable when she purportedly dismissed the claimant summarily without complying with the Rules or whether

she complied with the Rules. In addition, counsel requested to know if the 1st defendant acted honestly, fairly and conscionably toward the claimant when she purportedly dismissed the claimant based on his alleged absence at a staff audit meeting which at best sought to fish out the ghost workers or when she purportedly dismissed the ghost in the person of the claimant instead of stopping the salary of the ghost worker if the so-called audit was not specifically directed against the claimant or if any audit was actually carried out?

Learned counsel to the claimant submitted that when a person did not act in good faith, his action must necessarily have proceeded from bad faith. Counsel went on to submit that the Court of Appeal has this to say while defining bad faith in Savannah Bank of Nigeria Plc vs. CBN [2009] All FWLR (Pt. 481) 939 at 991 paras F-G:
Bad faith is defined as opposite of good faith, generally involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or some contractual obligation, not prompted by an honest mistake as to one's duties but some interested or sinister motive. The term 'bad faith' is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of a dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design or ill will.

The claimant's counsel further submitted that every act taken by the 1st defendant in relation to the claimant in the purported execution of her duty was tainted with unhidden bad faith. The 1st defendant handled the dismissal of the claimant with such zeal and dispatch that show '…some interested or sinister motive … 'and' a state of mind affirmatively operating with a furtive design or ill will'. Counsel went on that her action showcased '… the conscious doing of a wrong because of a dishonest purpose or moral obliquity'

The claimant furthermore submitted that section 59 of the Local Government Law of Enugu State Cap. 109 Vol. V. Laws of Enugu State 2004 on which the 1st defendant anchored her objection is a form of limitation of action or immunity which the chairman and members of the Local Government Service Commission are to enjoy once they act bona fide in the discharge of their duties. To the claimant, it, therefore, follows that when the chairman or member of the Local Government Service Commission acts mala fide, they will not enjoy that protection, referring to Ibrahim v. Judicial Service Commission Kaduna State [1998] 12 KLR (Pt. 73) 2489 at 2492 where the Supreme Court held as follows:
'It can therefore be said that section 2(a) of the Public Officers (protection) Law, 1963 gives full protection or cover to all public officers or persons engaged in the execution of public duties who at all material times acted within the confines of their public duty. Once they step outside the bounds of their public authority and are acting outside the colour of their office or employment or outside their statutory or constitutional duty, they automatically lose protection of that law…'

Learned counsel submitted that in his statement of facts, the claimant alleged that the 1st defendant took a bribe of 2 million naira with a promise of N300,000 per month from the NULGE check-off dues. To the claimant's counsel, the 1st defendant has a duty to disprove this fact. Instead of taking steps to disprove the fact, the 1st defendant is busy wanting to have her name struck off the suit. Counsel argued that if this is done, nobody will discharge that duty on her behalf. Counsel contended that an allegation bordering on this gross financial scandal is outside the execution of the 1st defendant's duty and outside any shade of colour of her public duty. The claimant went on that he had earlier on accused the 1st defendant to her face that the rival NULGE group was using her to fight him. Therefore, the 1st defendant cannot be heard seeking to find a hiding with this present application.

Counsel to the claimant maintained that it is not clear in this application whether learned defence counsel is arguing from the general principles of practice and procedure or his argument is based solely on section 59 of the Local Government Law of Enugu State Cap. 109 Vol. V Laws of Enugu State 2004. He submitted that the claimant has a claim against the 1st defendant and even if her name is not subscribed as a party, with the weighty allegations made against her person in the pleadings, she will definitely be affected by the outcome of the suit. Therefore, the inclusion of the 1st defendant as a party is not a misjoinder. Learned claimant's counsel furthermore submitted that the 1st defendant is indeed a proper and necessary party, citing A.G. Federation v. A.G. Abia [2001] 7 KLR (Pt. 127) 2599 at 2601 para. H to the effect that once a person will be affected by the outcome of a matter, such a person will necessarily be joined as a party.

Learned counsel to the claimant submitted that the 1st defendant in the circumstance of this case cannot even claim to

be an agent of a disclosed principal. She is being accused of doing some acts that have placed her outside the confines of her public duty and she is, therefore, on a frolic of her own and cannot take cover under the 2nd defendant. The claimant, therefore, urged the court to look at the totality of the averments in the statement of facts as they concern the 1st defendant and make a finding that the 1st defendant indeed has a personal case to answer in this suit. He further urged the court to refuse the application.

Replying on points of law, the defendants stated that the claimant's counsel raised the preliminary point in her reply dated 8th March and filed 11the March 2011. That the defendants did not frontload the evidence of their witnesses and that it was improper for the 1st defendant to claim an official status when she was sued in her personal capacity. The defendants maintained that it suffices to say on this point that these contentions are not supported by the National Industrial Court Rules 2007.

On the second requirement as presented by the claimant that the 1st defendant must have acted in the execution of her duty, the defendants submitted that the dismissal of the claimant was on the grounds given by the 1st defendant hence within the confines of her public duty and authority under section 58 of the Local Government Law, Cap. 109 Vol. V, Laws of Enugu State 2004 and to authorize the letter of dismissal given to the claimant. The defendants urged the court to hold that the 1st defendant acted within the scope of her authority and in the course of execution of her duty in relation to this matter.

Learned counsel to the defendants replicated what he called the claimant's counsel erroneous statement on page 3, paragraph 3 of his reply to preliminary objection as follows: "In his statement of facts, the claimant alleged that the 1st defendant took a bribe… The 1st defendant has a bounden duty to disprove this fact. Instead of taking steps to disprove the fact, the 1st defendant is busy want(ing) to have her name struck off the suit." Counsel submitted that this is not the true position of law, referring to UBA Plc. v. Jargaba [2007] 11 NWLR (Pt. 1045) 247 at 268 where the court held that "The proposition of the law in such circumstances is that proof always lies on him who assets, not upon him who denies." The burden is on the claimant to prove his assertions as he was the one who asserts. Counsel referred also to sections 134 and 135 of the Evidence Act in support of her argument.

The defence counsel submitted that all the cases cited by the claimant in his address are not applicable in the circumstances of this suit. That Savannah Bank Plc. v. Central Bank of Nigeria (supra) is only relevant to the extent of its definition of bad faith and must be distinguished from the instant case because the financial position of the appellant in that case had changed to the knowledge of the respondent before the respondent withdrew its banking license. She went on that there was no such change of position or attitude to work in the claimant's case. Also learned counsel to the defendants submitted that Ibrahim v. Judicial Service Commission, Kaduna State (supra) was on whether the Public officers Protection Act applied to public offices or institutions as it did to individual public officers. The Supreme Court affirmed the decision of both the trial court and the Court of Appeal that it did.

The defendants urged the court to find that in taking disciplinary action against the claimant, the 1st defendant acted in good faith in the execution of her official duties. Therefore, she is entitled to the immunity provided in section 59 of the Local Government Law of Enugu State 2004. Accordingly, the defendants prayed the court to uphold their objection and strike out the name of the 1st defendant in the suit.

After a careful consideration of this application, the sole issue for determination by this court is whether the 1st defendant has been properly made a party to this suit. The argument of the claimant is that she is; while that of the defendants is that she is not. In arguing that the joinder of the 1st defendant is proper, the claimant asserted and made various and elaborate allegations against the 1st defendant, allegations that ordinarily amount to fraud and crime. The question that presently arises is whether this court can enquire into those allegations given the cause of action in this suit predates the Third alteration to the 1999 Constitution. Before the Third Alteration to the 1999 Constitution, this court had no jurisdiction over issues that amount to crimes.

Even aside from this fact, there is the second issue whether a public officer who acted in an official capacity can be sued in his/her personal capacity even if the officer acted mala fide? The Supreme Court in the case of Hope Democratic Party v. INEC [2009] KLR (Pt. 264) 623, where Prof. Maurice Iwu was sued in his personal capacity for acts done in his

capacity as INEC Chairman, ruled that he was improperly sued and ordered that his name be struck off the suit. On this authority, there is no reason whatsoever to keep the name of the 1st defendant as a party in this suit.

For all these reasons, we hold and hereby rule that the name of the 1st defendant, Mrs. Bridget Orjiekwe, be struck off this suit. All processes in this matter are to be amended accordingly.

Ruling is entered accordingly. We make no order as to cost.

Hon. Justice F. I. Kola-Olalere
Presiding Judge

Hon. Justice O. A. Obaseki-Osaghae
Judge

Hon. Justice J. T. Agbadu-Fishim
Judge