

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION, HOLDEN AT LAGOS
ON WEDNESDAY THE 5TH DAY OF OCTOBER, 2022
BEFORE HON. JUSTICE A. LEWIS-ALLAGOA
JUDGE

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SUIT NO.: FHC/L/CS/196/2020

BETWEEN

THE REGISTERED TRUSTEES OF

THE INITIATIVE FOR EQUAL RIGHTS

PLAINTIFF

AND

1. FEDERAL REPUBLIC OF NIGERIA

2. ATTORNEY GENERAL OF THE FEDERATION

DEFENDANTS

JUDGEMENT

1.00 By this Originating summons which was dated and filed on the 7th day of February, 2020. The Plaintiff prays for the following reliefs:

1. A DECLARATION that sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 and any of them are in violation of-

(a) section 39(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and/or

(b) section 40 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or articles 10(1) and 11 of the

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African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004;

and are therefore unconstitutional, null and void;

2. AN ORDER nullifying sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 for being in violation of-

(a) section 39(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and/or

(b) section 40 of the Constitution of the Federal Republic of Nigeria 1999 (As amended) and/or articles 10(1) and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and/or

3. SUCH OTHER RELIEF as the Court thinks just.


1.01 The Plaintiff is praying the Honorable Court for the DETERMINATION of the following questions:

1. Whether sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 are prima facie inconsistent with and/or in violation of the provisions of-

a. Section 39(1) of the Constitution of the Federal Republic of Nigeria 1999 (As amended) and/or article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and/or

b. section 40 of the Constitution of the Federal Republic of Nigeria 1999 (As amended) and/or articles 10(1) and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004.

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2. Whether the prima face contraventions of the said sections of the Constitution of the Federal Republic of Nigeria 1999 (as amended) by the said sections of the Same Sex Marriage (Prohibition) Act 2014 are reasonably justifiable in a democratic society in accordance with section 45 of the Constitution.

1.02 The Plaintiff also relies on the following grounds in seeking the reliefs:

A. Sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 and each of them are inconsistent with section 39(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and/or section 40 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or articles 10(1) and 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10 LFN 2004; and are therefore void to the extent of such inconsistencies by virtue of section 1(3) of the aforesaid Constitution.

1.03 In support is an affidavit which was deposed to on the 7th day of February 2020, by one Azeenarh Mohammed. Attached is Exhibit AM1 – copy of a certificate of the corporate affairs commission dated 31st of August, 2016. Also filed is an affidavit of non multiplicity of action.

1.04 Also in support is a written address wherein 2 issues were raised for determination to wit:

i. Whether the Challenged Provisions (or any of them) are, prima facie, inconsistent with the Plaintiff's fundamental rights, and in

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particular those guaranteed by sections 39 and 40 of the Constitution and 8, 9, 10 and 11 of the African Charter.

- ii. If the answer to the first issue is yes, whether such Challenged Provisions (or any of them) are reasonably justifiable in a democratic society in accordance with section 45 of the Constitution.

1.05 Learned silk submitted that in a case such as this, where members of Nigerian society ask the Court to review the constitutionality of a law, the requirement of standing will not operate as a bar. Counsel relied on the case of **ADESANYA v. PRESIDENT (1981) 1 ALL NLR 1, P. 12.**

1.06 On the 1st issue, It was submitted that the issue is answered in the affirmative. Counsel submitted that the Challenged Provisions prohibit (and punish with severe custodial sentences) the registration, sustenance, processions and meetings of gay organisations, and punish with up to a decade's imprisonment not only persons who themselves register, operate, or participate in gay organisations, but also persons or groups of persons who merely support their registration, operation and sustenance. These individual terms are not defined in or delimited by the SSMPA.

1.07 It was the submission of Learned silk that a blanket ban on registration alone is the most fundamental means of restricting one's protected right to form and belong to an association or express one's opinions without interference; Counsel stated that the Challenged Provisions goes further, outlawing the very essence of the Plaintiff's organisation. For any organisation, these prohibitions would render its members' ability to associate with others illusory, but the effect on the Plaintiff is especially severe because, by its nature, it depends heavily on, inter alia:

1. the assistance of staff and volunteers to organise meetings and initiatives;
2. the ability to liaise with stakeholders and members of the LGBTI community;
3. the freedom to advertise their services and promote their activities to the LGBTI community, through social media and by other means; and
4. the willingness of third parties to provide meeting and office space

-all of which are criminalised by the Challenged Provisions.

1.08 According to Counsel some of the infringements perpetrated by the SSMPA are described in a recently published, 108-page report compiled by Human Rights Watch, an independent, international organisation that strives to defend human rights worldwide. Counsel stated that the report is based mostly on interviews with 73 LGBT Nigerians and representatives of 15 Nigeria-based NGOs and fieldwork across the country. It was the submission of Counsel that among the report's key recommendations are that the Federal Government review the SSMPA "with a view to creating an enabling environment for LGBT individuals, human rights defenders, and organizations to exercise their constitutional rights to freedom of association and expression". It also calls on the Government to "take all necessary measures to ensure the respect for and protection of human rights of LGBT persons in Nigeria" in accordance with the country's international human rights obligations; and to employ "political, administrative and legislative measures to ensure that human rights defenders working on sexual orientation and gender identity issues, including women human rights defenders, work in an enabling environment that is free of stigma, reprisals, or criminal prosecution". The report also called upon Nigeria's National Human Rights

Commission, among others, to “investigate all human rights violations based on sexual orientation and gender identity in accordance with (its) protection mandate”.

1.09 Issue 2: is any infringement justified?

1.10 Learned silk submitted that If the Court agrees that the Challenged Provisions (or any of them) do, prima facie, infringe the fundamental rights relied on (or any of them), the next issue is whether such infringements are reasonably justifiable in a democratic society in accordance with section 45 of the Constitution.

2.00 It was submitted that no limitation to the fundamental rights guaranteed under the Constitution can be justified unless the Defendant can show that it:

- i. pursues a legitimate aim, i.e., one of the purposes expressly provided for;
- ii. is absolutely necessary for the achievement of that aim;
- iii. is a strictly proportionate means of achieving that aim; and
- iv. does not render the right itself illusory.

2.01 Learned silk’s submission on the justification of infringement is that even assuming (which, for the reasons set out below, is not the case) that the Challenged Provisions can be said to pursue a legitimate aim as provided for under the Constitution, the infringements of the Plaintiff’s fundamental rights that result from those provisions are too grave and far-reaching to be capable of justification.

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2.02 It was the submission of Counsel that the Challenged Provisions provide for 10 years' imprisonment for participating in, or even merely "supporting", a gay organisation. Learned silk further submitted that Laws of such severity are simply incompatible with the guarantees of freedom of conscience, expression and association under the Constitution. Counsel stated that they render those rights illusory, and as such they are unconstitutional.

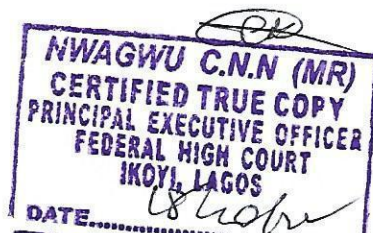
2.03 Learned silk referred to the cases of **NAFIU RABIU v. STATE (1980) S.C 130, P. 42; ABDULKARIM v. INCAR (NIG) LTD (1992) NWLR (PT. 251) 1, P. 144; SHELTON v. TUCKER 364 US 479 (1960), 3488;** and also the **ALL NIGERIA PEOPLE'S PARTY** case where it was held that:

“Even though the Government's purpose may be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties”

2.04 It was the submission of Learned silk that it is denied that the Challenged Provisions pursue any legitimate aim. He stated that even if the converse may be arguable, they so broadly stifle the fundamental rights in issue that, in the Plaintiff's submission, the end cannot justify the means.

Putative justifications: overview:

2.05 Learned silk submitted that it is inconceivable that the Challenged Provisions might be reasonably justifiable in the interest of defence, public safety, or public order, or for protecting the rights and freedoms of others.



2.06 It was submitted that any attempt to justify the Challenged Provisions by reference to such aims would be misconceived.

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Public morality

2.07 Counsel stated that the Defendant may seek to justify the Challenged Provisions as reasonably justifiable in the interest of public morality. It was also submitted that any such argument should be rejected. In particular, and as set out further below:

1. "Public morality", in the meaning of the Constitution, must be given a meaning that serves the object and purpose of the Constitution.
2. Neither the fact that certain homosexual sexual acts are illegal in Nigeria, nor any putative popular disapproval of homosexuals, can justify the infringement of the Plaintiff's basic fundamental rights.

"Public morality" in the meaning of the Constitution

2.08 It was submitted that the first place to find guidance on the meaning of "public morality" is the Constitution itself. According to Counsel Chapter II of the Constitution, sets out the Fundamental Objectives and Directive Principles, which identify respectively the ultimate objectives of the Republic and the policies to be pursued in order to realise them. The Fundamental Objectives and Directive Principles are not themselves justiciable, in that Section 6(6) (c) of the Constitution provides that the jurisdiction of the Courts does not extend to determining whether any act or omission is in conformity with them. "S However, Section 13 provides:

"It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution"


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2.09 According to Counsel the Courts themselves are charged with conforming to, observing and obeying the provisions of Chapter II by Section 13. Learned silk submitted that in seeking to identify what constitutes “public morality” in Nigeria the Court should first seek to give effect to the principles set out in Chapter II. Those principles provide, in particular, that:

1. the Federal Republic shall be a State based on the principles of democracy and social justice: S. 14(1);
2. the motto of the Federal Republic shall be Unity and Faith, Peace and Progress: S. 15(1);
3. the State social order is founded on ideals of Freedom, Equality and Justice: S. 17(1), in furtherance of which:
 - a) “every citizen shall have equality of rights, obligations and opportunities before the law”: s. 17(2) (a);
 - b) “the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced”: S. 17(2) (b);
and
 - c) “governmental actions shall be humane”: S. 17(2) (c);
4. the national ethics shall be Discipline, Integrity, Dignity of Labour, Social Justice, Religious Tolerance, Self-reliance and Patriotism: S. 23; and
5. the duties of every citizen include respecting the dignity of other citizens and the rights and legitimate interests of others and live in unity and harmony and in the spirit of common brotherhood: s. 24(c).

2.10 It was the submission of Counsel that popular opinion, by contrast, cannot provide a legitimate basis on which to define the morality that the Constitution seeks to uphold. He stated that the very purpose of

fundamental rights in a democracy is to protect minorities from the exercise of majority power. Counsel submitted that if such rights cannot be invoked where to do so would conflict with popular opinion, their very substance is destroyed. As the Constitutional Court of South Africa held in **S v. MALWANYANE AND ANOR (CCT3/94) [1995] ZACC3**

“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for Constitutional adjudication [...] The very reason for establishing (the Constitution}, and for vesting the power of judicial review in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and social marginalised people of our society”

3.00 Counsel referred to the case of National Coalition for Gay and Lesbian **EQUALITY v. MINISTER OF JUSTICE 1999 (1) SA 6**, the South Africa Constitutional Court held that:

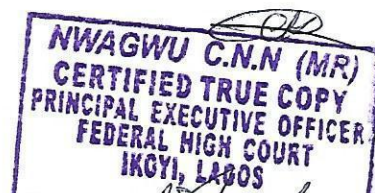
“A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself”

3.01 In the case of **PATRICK REYES v. THE QUEEN** (Appeal No. 64 of 2001), at paragraph 26, the Privy Council said of the interpretation of the Constitution of Belize:

“The court has no licence to read its own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion”

3.02 Reliance was also placed on the following cases: **WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE** 319 U.S. 624 (1943), 638; **JOHN HARUN MWAU AND ORS v. ATTORNEY GENERAL AND ORS**, Petition No. 65 of 2011 [Consolidated with] Petitions Ns 123 of 2011 and 185 of 2011 [2012], the High Court of Kenya held that:

“This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasize that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion... our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives”.



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3.03 It was also submitted that the fact that certain homosexual sexual acts have long been illegal in most parts of Nigeria cannot bear on the analysis. Even if the prevention of such acts were to be considered a legitimate aim, then applying the test set out in section F4, and in particular that of the Court of Appeal in the All Nigeria People's Party case, Counsel stated that it is obvious that the Challenged Provisions cannot amount to a necessary means of achieving that aim, much less a proportionate one. The Criminal Code already exists (and has long existed) for that purpose.

3.04 Counsel stated that the fact that some part (even if it were a large part) of the Nigerian public may disapprove of homosexuality, or dislike LGBT people, cannot justify a restriction on the fundamental rights of such people.

3.05 Reference was made to the case of **KANANE v. STATE 2003 (2) BLR 67 (CA)**, where the Botswana Court of Appeal determined that gay men and lesbians were not hindered by sections of the penal code that criminalised same-sex sexual conduct from associating with each other, concluding at page 8: "There is nothing to prevent them still associating, subject to the law".

3.06 Counsel also referred to decision of the Caribbean Court of Justice in **McEWAN AND ORS v. ATTORNEY GENERAL OF GUYANA**, striking down as unconstitutional a prohibition on cross-dressing. Having recognised that the existence of transgendered persons "for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against, those who are different", Saunders P. observed:

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"It is for courts to afford the protection of the law to those who experience the brunt of such behavior"

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"No one should have to live under the constant threat that, at any moment, for an unconventional form of expression that poses no risk to society, s/he may suffer such treatment. But that is a threat that exists in section 153(1) (xlvi). It is a threat particularly aimed at persons of the LGBTI community. The section is easily utilised as a convenient tool to justify the harassment of such persons. Such harassment encourages the humiliation, hate crimes, and other forms of violence persons of the LGBTI community experience. This is at complete variance with the aspirations and values laid out in the Guyana Constitution"

- 3.07 Learned counsel submitted that the Challenged Provisions in the instant case, by contrast, impose a blanket prohibition on, and criminalise all participation in and association with, any gay organisations, regardless of their aims and purposes. Counsel submitted that they contravene the rights and freedoms.
- 3.08 According to Counsel upholding the fundamental right of LGBTI people to freedom of conscience, expression and association no more threatens the democratic state of Nigeria than it does her sisters in democracy worldwide. To the contrary, democracy is sustained by such a result; and grievously undermined by its suppression.
- 3.09 In further submission, it was stated that the Challenged Provisions are not simply incapable of being justified in the interest of public morality - but

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in the light of the fundamental parameters of that morality, as articulated above all in the Constitution, they contravene it.

Public health

3.10 It was also the submission of learned silk that the Defendants may also seek to defend the Challenged Provisions as reasonably justifiable in the interest of public health. Counsel submitted that this argument cannot succeed; and that the SSMPA is in fact itself an obstacle to public health.

4.00 According to Counsel, there is nothing on the face of the statute that would suggest that the sweeping restrictions imposed by the SSMPA are intended to protect public health. Instead the Challenged Provisions apply indiscriminately to each and every gay organisation, and those who operate and support them, without regard to their aims and objectives.

4.01 Counsel also stated that it is not clear how any of the operations of organisations working with and on behalf of LGBTI people have a negative impact on public health. There is no evidence that such organisations do anything at all to incite homosexual sexual activity. Counsel stated that even if they did, the Challenged Provisions would not be necessary to prohibit such incitement, because it would be illegal under Nigerian criminal law as it stands without the Challenged Provisions.

4.02 According to Counsel in June 2015, a study in The Lancet reported on the impact of the SSMPA on health-seeking behaviors of men who have sex with men (MISM) in Nigeria, following a cohort study conducted between March 2013 and August 2014 at a clinical site in Abuja. The


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study assessed the engagement of MSM with HIV prevention and treatment services. It was underway when the SSMPA was introduced into law. The results record a sharp uptick in reports of fear of seeking healthcare, avoiding seeking healthcare, verbal harassment and blackmail following the promulgation of the SSMPA.

4.03 Counsel submitted that the African Commission has recognised these concerns, observing that

“the enactment of a law criminalizing homosexuality has the potential to engender violence against persons on grounds of their actual or imputed sexual orientation, and also to drive this group of persons vulnerable to HIV/AIDS underground, thereby creating an environment which makes it impossible to effectively address the HIV pandemic in the State [of Nigeria]” and recommended a “review of the Same-Sex Marriage Prohibition Act in order to prohibit violence and discrimination in access to HIV prevention, treatment and care services, as well as to ensure the protection of other human rights of sexual minorities guaranteed under the African Charter and other international instruments to which Nigeria is a party”.

4.04 In Conclusion, Counsel submitted that they seek nothing other than the same rights guaranteed to all Nigerians under the Constitution. It was further submitted that the SSMPA goes much further than its stated and redundant aim of prohibiting gay marriages. Instead it denies the Plaintiff, and other similar persons, rights taken for granted by all peoples in any civilised society, namely the right to think freely, express and share ideas, and to associate with one another and other groups and organisations. Counsel stated that this incursion into the most basic of human rights is

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not justifiable under the Constitution or indeed under any law. Its effect is to demean and degrade the very existence of certain human beings and their rights to the most basic of freedoms thereby offending against all notions of basic fairness, humanity and respect for one another.

4.05 The Court was urged to grant the reliefs sought in the Originating summons.

4.06 Counsel to the Defendant filed a Notice of Preliminary Objection brought pursuant to Order 29(1) of the Federal High Court (Civil Procedure) Rules 2019; Section 39, 40, 45 & 251 (1) (A)-(S) of the Constitution of the Federal Republic of Nigeria 1999(As Amended); Sections 4(1), 5(2) and 5 (3) of the Same Sex Marriage Prohibition Act and under the Inherent Jurisdiction of the Honourable Court. The Preliminary Objection was dated the 30th day of March, 2020 but filed on the 5th day of June, 2020.

4.07 The Defendant by way of Objection in line at the hearing of the Plaintiff's Originating Summons, raise Preliminary Objection to dispute the Court's jurisdiction and that the court should not exercise its jurisdiction as against the Defendants.

4.08 The grounds for the objection are as follows:

1. It is the State High Court that has jurisdiction over all matters arising from breach of provisions of the Same Sex Marriage Prohibition Act, 2014.
2. Matters relating to Marriage does not come within the Exclusive Jurisdiction of the Federal High Court provided for under Section 251 of the 1999 Constitution (As amended)

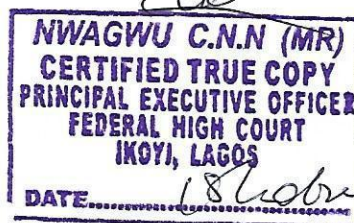


3. All Fundamental Human Rights entrenched in the chapter IV of the Constitution of the Federal Republic of Nigeria, inclusive of Sections 39 & 40, are all qualified rights not absolute.
4. The National Assembly, in which the Legislative powers of the Federal Republic of Nigeria for making Laws for the peace, order and the good governance of the Federation is vested in, are not made a party to this suit.
5. The Plaintiff lacks the locus standi to initiate this suit as the enactment and the provisions of the Same Sex Marriage (Prohibition) Act 2014 vitiates the Objectives of the Plaintiff Organization thereby rendering the Plaintiff an illegal Organization.
6. The Defendants/Applicants are not proper and/or necessary parties in this suit.
7. The Same Sex marriage (Prohibition) Act, 2014 , which is a law formulated by the National Assembly, was made pursuant to the exceptions particularly in Sections 39, and 40 which flows from the provision of Section 45 of the Constitution of the Federal Republic of Nigeria.

4.09 In support is an affidavit of 6 paragraph which was deposed to on the 9th day of June, 2021 by one Akiniyi Ogundipe.

4.10 Also in support is a Written address wherein a sole issue was raised for determination to wit:

Whether this Honorable Court has the requisite jurisdiction to entertain the Plaintiff/Respondent Originating Summons dated 24th of February, 2020.



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5.00 Learned Counsel submitted that it is the State High Court that has jurisdiction over all matters arising from breach of provisions of the Same Sex Marriage (Prohibition) Act, 2014. Section 6 of the Same Sex Marriage (Prohibition) Act, 2014 which provides as follows;

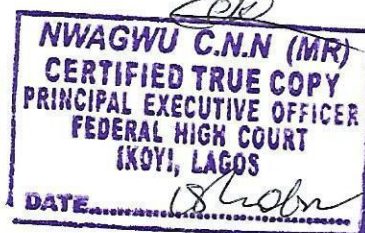
“The High Court of a state or of the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of this Act”

5.01 Counsel submitted that this Honourable Court lacks jurisdiction to entertain this suit because this matter ought not to be entertained before this Honourable Court and this matter should be dismissed in its entirety.

5.02 It was submitted that the matters relating to Marriage does not come within the Exclusive Jurisdiction of the Federal High Court provided for under Section 251 of the 1999 Constitution (As amended).

5.03 It was further submitted that the Federal High Court does not have the subject matter jurisdiction with regards to matters relating to any kind of Marriage whatsoever or matters arising therefrom because the provisions of Section 251(1) (a) - (s) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which are matters within the exclusive jurisdiction of the Federal High Court are clear and unambiguous.

5.04 In submission, counsel stated that Fundamental Human Right entrenched in the chapter IV of the Constitution of the Federal Republic of Nigeria are all qualified Rights and not absolute.



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5.04 Counsel referred to Sections 39 and 40 which provides for the Freedom of Expression and the Freedom of Association, respectively and they state as follows;

“39. (1) every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference...

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

40. Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests...”


5.06 Counsel stated that Section 45 of the 1999 Constitution, however, gave exceptions to the above sections of the Constitution when it stated that;

“45. (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons.

5.07 It was the submission of Counsel that the Rights to Freedom of Association and Expression as envisaged by the Plaintiff are not absolute to the extent that it is against a Law of the National Assembly formulated by the creation of the Same Sex Marriage (Prohibition) Act, 2014 which is a law to protect public morality that is reasonably justifiable in Nigeria.


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Counsel referred to the case of **CHUKWUMA v. C.O.P. (2005)8NWLR (Pt. 927) 278 at 287 (CA)**.

5.08 Learned counsel submitted that Public morality as envisaged by the Plaintiff has been misconstrued and is contrary to the intention of Constitution. It was submitted that the Plaintiff has therefore linked the scope of the definition of Public Morality to the enforceability of Chapter II of the 1999 Constitution and also definitions and scope of meaning in other jurisdictions (not binding in Nigeria) to mean the same thing in the context of the Nigeria Constitution which is representing the common beliefs, Morals and Order of the Nigerian People. The Plaintiff also seems to have misdirected itself in law by using definitions of Public Order for the intention of Public Morality in the Nigerian Courts.

5.09 According to Counsel the interpretation of Marriage has been interpreted with the aim of accommodating the creation of the Same Sex Marriage (Prohibition) Act, 2014 by the National Assembly which is to clearly reflect the meaning of marriage within the confines of the public Morals of the Nigerian People and therefore to regulate sexual behavior in a democratic society.

5.10 It was the submission of Counsel that the exception of Public Morality (within the intention of the Constitution) applies to Sections 39 and 40 of the 1999 Constitution and therefore expunges any right envisaged by the Plaintiff as it relates to the creation of the Same Sex Marriage (Prohibition) Act, 2014.

6.00 The National Assembly, in which the Legislative powers of the Federal Republic of Nigeria for making Laws for the peace, order and the good


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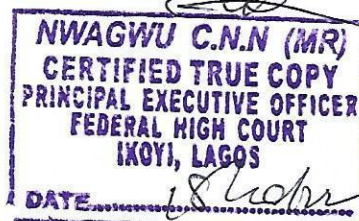
governance of the Federation is vested in, is not made a party to this suit. Counsel referred to Section 4 of the Constitution of the Federal Republic of Nigeria.

6.01 Learned counsel submitted that the National Assembly ought to have been joined as a Defendant in this suit given that their functions will directly apply to the outcome of this suit.

6.02 Counsel submitted that the Plaintiff lacks the locus standi to institute this suit as the enactment and provisions of Same Sex Marriage (Prohibition) Act 2014 vitiates the Objectives of the Plaintiff organization thereby rendering the Plaintiff an illegal organization.

6.03 It was submitted that the Plaintiff has alleged that the Organization was initially registered sometime in 2010 but was instituted in 2016 after the enactment of the Same Sex Marriage (Prohibition) Act 2014 with aims including but not limited to:

- a. advocating for the fundamental rights of vulnerable and marginalized members of the society, with a focus on sexual minorities in Nigeria;
- b. providing legal support for members of the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community where needed;
- c. meeting the health needs of sexual minorities in the South West of Nigeria
- d. reducing sexual-identity-related stigma with the help of research and available knowlegde; and
- e. offering a safe space for sexual minorities to meet socially to discuss issues affecting them and the community. (Paragraph 7 of the Plaintiff's Affidavit)



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6.04 Learned counsel submitted that at the establishment of the organization, there was no law prohibiting the objectives of the organization. However, the creation and provisions of the Same Sex Marriage (Prohibition) Act 2014, which was envisaged by the provisions of Section 45 of the Constitution has vitiated the objectives of the organization. Therefore, the organization and its objectives can be deemed illegal as it does not comply with the provisions of an Act of the National Assembly which seeks to regulate activities of same sex individuals in the Nigerian society.

6.05 In submission counsel stated that the provisions of Sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act 2014 being sought by the Plaintiff to be interpreted vitiates the objectives of the Organization and thereby renders the organization and its objectives illegal. The Court was urged to so hold.

6.06 Counsel submitted that it is trite law that a plaintiff must have locus standi to commence or institute an action. It was stated that where this is lacking, the court cannot entertain the action as it lacks jurisdiction to do so.

6.07 It was further submitted that the Plaintiff has no locus to institute this action as the establishment of the Act by the National Assembly renders their associations illegal and punishable with terms of imprisonment.

The Defendants/Applicants are not Proper and/or Necessary Parties.

6.08 Learned counsel submitted that necessary parties are those who not only have interest in the matter, but also who in their absence, the proceedings

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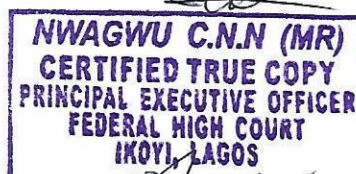
could not be fairly and effectually dealt with- reliance was placed on the case of **GREEN v. GREEN (1987) 3 NWLR (PT. 61) 480**. Counsel submitted that it is unnecessary, to join a party to any proceeding, where the complaint is not made against such a party.

6.09 Counsel also referred to the case of **LSBPC v. PURIFICATION TECH. (NIG) LTD (2013) 7 NWLR (PT 1352) P. 82 @ 113**, a necessary party has been defined as someone whose presence is essential for the effectual and complete determination of the issues before the court. He is a party, in the absence of whom, the whole claim cannot be effectually and completely determined. Counsel also referred to the case of **T.DELAK DISTRIBUTION SERVICE LTD. & ANOR. v. UGBOWANKO (2018) LPELR-46480(CA)**.

6.10 Learned Counsel submitted that it is unnecessary for the Plaintiff to sue the party that does not have the capacity to remedy the wrong for which it is sued. Counsel stated that this will without doubt make futile any order that will be made by the Court in this matter.

7.00 It was submitted that the Defendants are not proper and/ or necessary parties in this suit.

7.01 Counsel submitted that it is the Act of the National Assembly that is being complained of by the Plaintiff therefore the absence of the National Assembly makes this suit an exercise in futility. It was further submitted that the National Assembly is the proper and /or necessary party in the determination of this matter .It was submitted that the absence of the National Assembly makes this proceeding a complete waste of time of



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this Honourable Court. The Court was urged to dismiss this suit in its entirety.

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- 7.02 In conclusion counsel submitted that the Exclusive Jurisdiction of the Federal High Court does not cover the subject matter of Marriage and matters arising therefrom notwithstanding the status of the Parties involved. He further stated that it is the State High Court that has jurisdiction over all matters arising from breach of provisions of the Same Sex Marriage (Prohibition) Act, 2014.
- 7.03 Counsel submitted that all Fundamental Human Rights entrenched in the chapter IV of the Constitution of the Federal Republic of Nigeria, inclusive of Sections 39 & 40, are all qualified rights not absolute.
- 7.04 It was also the submission of Counsel that the National Assembly, in which the Legislative powers of the Federal Republic of Nigeria for making Laws for the peace, order and the good governance of the Federation is vested in, is not made a party to this suit. In further submission, counsel stated that the Plaintiff lacks the locus standi to initiate this suit as the enactment and the provisions of the Same Sex Marriage (Prohibition) Act 2014 vitiates the Objectives of the Plaintiff Organization thereby rendering the Plaintiff an illegal organization.
- 7.05 According to Counsel, the Defendants/Applicants are not proper and/ or necessary parties in this suit. Learned counsel also submitted that the absence of the National Assembly, who is the proper/necessary party in this suit makes this entire suit an exercise in futility.

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7.06 The Court was urged to dismiss the Plaintiff Originating Summons dated 24th of February, 2020 for lacking in merit and aimed at wasting the precious time of this Honourable Court.

7.07 Dated the 13th day of August, 2020 but filed on the 21st day of August 2020, is the Defendant/Applicant's Reply address on point of law. 5 issues for determination in response to the Plaintiff/Respondent were raised to wit:

1. Whether the presence of the National Assembly is required for the proper determination of this suit.
2. Whether there are certain instances where the issue of misjoinder or non-joinder can terminate a suit.
3. Whether the High Court of the State and the High Court of the Federal Capital Territory can only have criminal jurisdiction with respect to the provisions of the Same Sex Marriage Prohibition Act, 2013.
4. Whether a Preliminary Objection can be raised in Opposition to the Plaintiff/Respondent Originating Summons.
5. Whether Fundamental Human Rights in Sections 39 and 40 of the 1999 Constitution are not absolute and public morality of the Nigerian people do outweigh these rights"

7.08 Counsel submitted that the argument by the Plaintiff/Respondent that because the President of the Federal Government assents to a Bill of the National Assembly cannot be a submission that the National Assembly is included in this present suit by virtue of the presence of the FEDERAL REPUBLIC OF NIGERIA as a Defendant. Counsel stated that this is because the specific functions of the National Assembly to make laws and to amend same is a primary and direct function wherein the National

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Assembly does not need the approval of the President to amend a law and in the event that the president withholds his assent to a Bill by the National Assembly, the National Assembly can still pass the Bill into Law by a two-third majority votes. Counsel referred to Section 58 (4) and (5) of the 1999 constitution provides as follows:

“58. (1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.

(4) Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.

(5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.”

7.09 Counsel reiterated that the National Assembly ought to have been joined as a Defendant in this suit given that their functions will directly apply to the outcome of this suit.

7.10 On the 2nd issue Counsel referred to the case of **OKWU & ANOR Vs. UMEH & ORS (2015) LPELR-26042(SC)**

8.00 Counsel submitted that although Order 9 Rule 14(1) of the Rules of this Honorable Court provides that no matter shall be defeated by reason of misjoinder or non-joinder, yet in the absence of the National Assembly (the necessary party in this suit), this suit may lead to an exercise in futility as envisaged in the above case law.

- 8.01 Counsel submitted that the necessary party, being the National Assembly, is not present in this suit, the suit should be dismissed in its entirety.
- 8.02 Whether the High Court of the State and the High Court of the Federal Capital Territory can only have criminal jurisdiction with respect to the provisions of the Same Sex Marriage Prohibition Act, 2014.
- 8.03 According to Counsel, the Plaintiff/Respondent submitted that provisions of Section 6 of the Same Sex Marriage (Prohibition) Act, 2014 confers only criminal jurisdiction on the State High Court and not civil jurisdiction. It was the submission of Counsel that this position is alien and very strange to jurisdictional powers of courts In Nigeria.
- 8.04 Learned counsel submitted that Sections 4(1), 5(1) and 5(2) of the Same Sex Marriage (Prohibition) Act, 2014 is part and parcel of the provisions of the same Act and cannot be interpreted independently from the rest of the Act. Counsel further submitted that It has never occurred in Nigeria that a court will be vested with the jurisdiction to adjudicate on criminal aspect of a subject matter and not the civil aspect of the same subject matter.
- 8.05 On Whether a Preliminary Objection can be raised in Opposition to the Plaintiff/Respondent Originating Summons.
- 8.06 According to Counsel, the Plaintiff/Respondent submitted that the Defendant/Applicant ought to have filed a Counter Affidavit with a Written Address instead of a Preliminary Objection when in fact the Defendants/Applicants stated clearly in their Preliminary Objection that the said Preliminary Objection was brought pursuant to Order 29 Rule 1 of

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the Federal High Court (Civil Procedure) Rules 2019 which clearly provides for the filing a Preliminary Objection in the circumstance of this suit.

8.07 Counsel relying on Order 29 Rule 1 submitted that a Preliminary Objection is allowed in response to an Originating Summons (no oral evidence) when disputing the Court's jurisdiction. Counsel stated that it is not out of place that the Defendant/Applicant filed a Preliminary Objection.

8.08 In response to the Plaintiff /Respondent Originating Summons. It was further submitted that as the issue of jurisdiction is pertinent to the sustenance of a matter, parties can raise the issue of jurisdiction via a Preliminary Objection at any time in the suit before judgment is delivered.

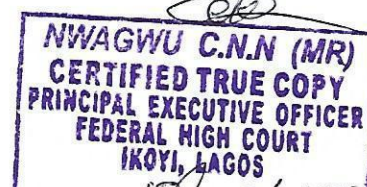
8.09 Learned Counsel referred to the case of **AG LAGOS STATE & ORS v. A.G OF THE FEDERATION & ORS (2014) LPELR-22701 SC**, stating that the Supreme Court per Muhammed JSC restated the position of the law on the need to take Preliminary Objections together with the substantive application in a matter commenced by way of Originating Summons thus:

“When a preliminary objection is raised in action such as the present one commenced by originating summons, it is always better to take the preliminary objection with the substantive that if the objection to the action succeeds, the case or action is terminated in limine. If the objection fails however, then the Court will proceed to determine the substantive action on its merit”


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IKOYI, LAGOS
DATE: 18/10/2018

- 8.10 The Court was urged to disregard submission of the Plaintiff/Respondent to the contrary.
- 9.00 Whether Fundamental Human Rights in Sections 39 and 40 of the 1999 Constitution are not absolute and public morality of the Nigerian people do outweigh these rights.
- 9.01 In response to the Plaintiff/Respondent argument that the subject matter of this suit is not that of Marriage but basically the alleged contravention or likely contravention of its Fundamental Human Right in the provisions of Sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act, 2014 which is part and parcel of an Act of the National Assembly. Counsel submitted that the likely breach of Human Rights complained about is not absolute; therefore the National Assembly can make laws limiting the Right of the Plaintiffs /Respondent for the benefit of the Nigerian Populace.
- 9.02 It was submitted that when a Fundamental Right offends public morality or interest, the Public interest or morality outweighs the Personal Right. Thus, the provisions of Sections 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act is not out of place and is in the interest of public morality and beliefs of the Nigerian people.
- 9.03 Counsel urged the Court to dismiss this suit in its entirety considering the public morality and interests of the Nigerian people which outweighs the personal rights of the Plaintiff/Respondent having regard to the fact that the Rights the Plaintiff/Respondent complained of are personal rights which are not absolute but qualified.

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9.04 In conclusion counsel submitted that the presence of the National Assembly is required for the proper determination of this suit.

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9.05 It was further submitted that although Order 9 Rule 14(1) of the Rules of this Honorable Court provides that no matter shall be defeated by reason of misjoinder or non-joinder, yet in the absence of the National Assembly (The necessary party in this suit), this suit may lead to an exercise in futility.

9.06 According to Counsel it has never occurred in Nigeria that a court will be vested with the jurisdiction to adjudicate on criminal aspect of a subject matter and not the civil aspect of the same subject matter, therefore, the State High Court and the High Court of the Federal Capital Territory have both criminal and civil jurisdiction in this suit.

9.07 Learned counsel also stated that a Preliminary Objection can be raised in Opposition to the Plaintiff/Respondent Originating Summons.

9.08 In submission, learned counsel stated that where Human Rights offends public morality or interests of the people, the Public interest and morality must outweigh it, especially when such rights have limitations that can be legislated upon by the National Assembly.

9.09 The Court was urged to dismiss the Originating Summons of the Plaintiff/Respondent dated 24th February, 2020 and discountenance the Written Address of the Plaintiff/Respondent dated 21st of July, 2020.

9.10 Filed is an Amicus Brief which was dated the 22nd day of March but filed on the 16th day of June, 2021.

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IKOYI, LAGOS

10.00 It was stated that the Plaintiffs have argued that the subject matter of this suit is not marriage but basically the alleged contravention or likely contravention of its Fundamental Human Right in the provisions of Section 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act, 2014 which is part of the Nigerian Law.

10.01 Counsel submitted that the fundamental rights complained about are not absolute and therefore the National Assembly can constitutionally make laws limiting the application of Sections 37, 38, 39, 40 and 41 in the interest of defense, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.

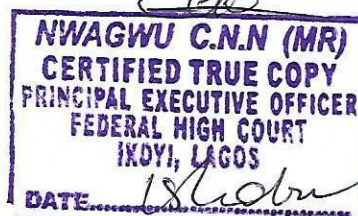
10.02 It was further submitted that the Constitution protects the right of persons to assemble freely and associate with other persons, and to form and join any associations for the protection of their interests, the enjoyment of this right has been limited by the exclusion clause provided in section 45 of the constitution which is to the effect that the rights provided for in the preceding sections shall not invalidate any law which is made that is reasonably justifiable in a democratic society in the interest of public morality. Reliance was placed on the case of **SOLOMON OKEDARA v. AG FEDERATION 2019 LPELR 47298**, where the learned trial judge held that the “restriction on freedom of speech as contained in Section 24 (1) of the Cybercrime Act was necessary in a democratic society as it relates to the interests of defense, public safety, public order, public morality or public health pursuant to section 45 of the Constitution.”

10.03 Counsel referred the cases of **DIN v. AFRICAN NEWSPAPERS OF NIG LTD (1990) LPELR-947 (SC); THE REGISTERED**

**TRUSTEES OF NATIONAL ASSOCIATION OF COMMUNITY
HEALTH PRACTITIONERS OF NIGERIA & 2 ORS v. MEDICAL
AND HEALTH WORKERS UNION OF NIGERIA (2008) 2 NWLR
(PT. 1072) 575 AT 603 PARA. C.**

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- 10.04 Counsel referred to Section 45 of the Constitution which provides thus:
“(1) nothing in sections 37, 38, 39, 40 and 41 of this Constitution, shall
invalidate any law that is reasonably justified in a democratic society-
1. In the interest of defense, public safety, public order, public
morality or public health; or
 2. For the purpose of protecting the rights and freedom of other
persons...”
- 10.05 It was the submission of Counsel that the legislature has the power to
enact laws that are reasonably justifiable in a democratic society and that
such laws shall not be declared invalid merely because they appear to be
in conflict with the rights and freedom extended to citizens under the
Constitution.
- 10.06 It was submitted by Counsel that the right of freedom of expression and
association guaranteed under section 39 cannot be taken away “except
for the purposes of preserving the interest of defense, public safety,
public order, public morality, public health or for the purpose of
protecting the rights and freedom of other persons.”
- 10.07 Counsel relied on the decision of the Court of Appeal in the case of
ABDULKAREEM v. LSG (2016) ALL FWLR (PT. 850) PG. 101
where it was held that:



“Fundamental Human Rights are not ordinary rights, they are elevated rights, some of them have their origin in international conventions or treaties. They are so special class of rights and no person shall be deprived of the enjoyment of any such rights except by the proper observance of the due process of law”

10.08 According to Counsel the Governments in Nigeria have at one time or the other promulgated laws to limit or restrict these freedoms. He gave an instance of Freedom of Expression been restricted by some laws, laws which include Criminal Defamation, Cybercrime Act, Sedition Law and the instant Same Sex Marriage Prohibition Act.

10.09 Counsel referred to the case of **OLAWOYIN v. ATTORNEY GENERAL OF NORTH NIGERIA (1961) ALL NR** where it was held that:

“A restriction upon a fundamental right before it may be considered justifiable must:

- a. be necessary in the interest of public morality
- b. not be excessive or out of proportion to the object which it is sought to achieve

For a restriction not to be excessive, it must have the following characters:

1. Defined by law: in **Abdulkareem v. LSG (supra)**, to satisfy the first requirement, the law or regulation which should be formally adopted by law making authorities, must be sufficiently clear and precise, vague or unclear provisions will not suffice.
2. Pursue a constitutionally recognized objective: the restriction must be in pursuit of only any of the itemized objectives in the constitution which are:

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- The interest of defence
- Public safety
- Public order
- Public morality
- Public health
- Rights and
- Freedom of other persons

3. be necessary and proportionate: The restriction is one necessary or required and be the least restrictive means to protect constitutionally recognized objectives. **Abacha v. Fawehinmi (2001) 51 WRN 29."**

10.10 Learned counsel submitted that the issue of homosexuality falls within the ambit of public morality as not a lot of Nigerians are comfortable with the practice of same sex activities. It was further submitted that the Nigerian government has simply invoked this section of the constitution in protecting the moral sensitivities of a significant number of Nigerians.

11.00 According to Counsel when a fundamental right offends public morality or interest, the public interest or morality outweighs the personal right, thus the provisions of Section 4(1), 5(2) and 5(3) of the Same Sex Marriage (Prohibition) Act, 2014 may not be out of place in the interest of public morality and beliefs of the Nigerian people.

11.01 Counsel submitted that the exception of public morality (within the intention of the constitution) applies to section 39 and 40 of the 1999 constitution and therefore limits or restricts rights envisaged by the Plaintiff as it relates to the creation of the same sex marriage


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IKOYI, LAGOS

(prohibition) Act, 2014 but does not totally expunge such rights being human rights.

11.02 Counsel further submitted that the Nigerian Criminal Law has criminalized certain acts of homosexual activities. He referred to Section 214 of the criminal code act which provides that any person who:

- i. has carnal knowledge of any person against the order of nature;
or
- ii. has carnal knowledge of an animal; or
- iii. Permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of an offence, and is liable on conviction to imprisonment for fourteen years.

11.03 It was the submission of Counsel that any association or assembly whose object(s) is/are criminalized or made illegal by the provisions of any law cannot be guaranteed by the provisions of sections 39 and 40 of the Constitution.

11.04 Counsel submitted that the Same Sex Marriage Act was made by the proper procedure of law making as established in the constitution.

NATIONAL HUMAN RIGHTS COMMISSION POSITION

11.05 The opinion of the Human Rights Commission were enumerated below:

11.06 According to Counsel the 1999 Constitution of the Federal Republic of Nigeria protects a range of fundamental rights, including respect for dignity of the person and prohibition of torture, inhuman, or degrading treatment; personal liberty; privacy; due process rights; and the rights to

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freely assemble and associate with other persons, including forming any association for the protection of one's interest. According to Section 15(2) of the Constitution, a citizen of Nigeria may not be discriminated against on the grounds of "place of origin, sex, religion, status, ethnic or linguistic association or ties."

11.07 It was submitted that freedom of association is the right of a person/persons to voluntarily form or join a group - and to work with the group on common interests, aspirations, and goals. Counsel submitted that the ability to form and join an organization enables people to meet and share ideas, organize around relevant issues, and engage in advocacy. It was further stated that in many countries you must register your organization with the government in order to operate. The organization cannot do things such as open a bank account, solicit funding and be eligible for tax incentives, without being registered. According to Counsel the right to freedom of association is closely linked to the right to freedom of expression, the right to freedom of assembly, the right to self-determination, and the right to take part in the conduct of public affairs. A denial of the right to freedom of association can affect the aforementioned rights, and infringe on the right to equality and non- discrimination, and the right to dignity.

11.08 Counsel submitted that all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests. Fundamental rights are to be enjoyed by every person. It was submitted that to deny any person his or her humanity is to deny such person human dignity. It was submitted that fundamental freedoms are to be enjoyed by every member of every class of society - the rich, the poor, the disadvantaged,


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citizens and non-citizens, and even criminals and social outcasts, subject only to the public interest and respect for the rights and freedoms of others.

11.09 Learned counsel submitted that freedom of association is a universal and fundamental right outlined by the UN Declaration of Human Rights and subsequent international agreements. International declarations on freedom of association aim to:

- i. Ensure organizations are free to form and decide their membership, how they are funded, and what they can work on;
- ii. Establish domestic laws that enable the exercise of freedom of association, including those governing an organization's legal existence, structure and governance, financial benefits and activities, sources of funding, reporting, and taxation; and
- iii. Ensure that policy and practice affecting association meet international standards and the three-fold threshold test (legality, necessity, and proportionality) regarding any restrictions to association.

11.10 According to Counsel the European Court of Human Rights (ECtHR) has applied the European Convention on Human Rights in significant judgments ruling that states should provide transgender persons the possibility to undergo surgery leading to full gender reassignment and that this surgery should be covered by insurance plans as “medically necessary” treatment. It was submitted that the Court has also ruled that states should recognize the change of sex in identity documents. Other instruments, such as the EU Directives implementing the principle of equal treatment between men and women in the access to and supply of


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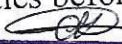
goods and services, have closed lists of discrimination grounds and do not include gender identity specifically.

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12.00 Counsel submitted that in terms of criminalization and discriminatory law enforcement, the government actively sponsors this discrimination while, in other cases, it passively neglects its duty to provide protection to gay and lesbian equal to that received by their heterosexual counterparts. It was further stated that these state actions have resulted in serious and oftentimes violent violations of political and social rights as well as basic rights to life, health, and dignity of persons and individuals.

12.01 It was submitted that the Same Sex Marriage (Prohibition) Act (SSMPA) contravenes basic tenets of the Nigerian Constitution, including respect for dignity, association and prohibition of torture. He also stated that it also goes against several regional and international human rights treaties which Nigeria has ratified, including the African Charter on Human and Peoples' Rights (African Charter), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights.

12.02 Learned counsel submitted that the challenged law in the Plaintiff's Originating Summons contradicts fundamental freedoms under international human rights treaties and standards, which the Nigerian Constitution also guarantees. The Nigerian Constitution, under section 40, guarantees that: "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union, or any other association for the protection of his interests." Section 17 affirms that "every citizen shall have equality of rights, obligations, and opportunities before the law."


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12.03 According to Counsel the existence of legislation criminalizing same sex conducts and the hostile environment that surrounds individuals on grounds of their real or perceived sexual orientation or gender identity has an impact on members of the LGBTI community to freely associate for social activities and for claiming their rights. Counsel submitted that the Nigerian Constitution does not explicitly protect LGBTI rights, it does, like the African Charter, provide all citizens equal rights, including the right to ensure that an individual's right to health is not "endangered or abused." Counsel stated that despite this claim, there are many instances where individuals who were suspected of homosexuality were denied access to health care. It was also submitted that the stigma associated with homosexuality in Nigeria is one that often prevents individuals from seeking medical treatment.

12.04 Learned counsel submitted that the Nigerian authorities should act swiftly to protect Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people from violence, whether committed by state or non-state actors. Counsel stated that Law enforcement officials should stop all forms of abuse and violence against LGBTI people, including arbitrary arrest and detention, torture in custody, and extortion, and without delay ensure that they are able to file criminal complaints against perpetrators.

12.05 In conclusion, it was submitted that the Fundamental Rights under review are not absolute as legitimate restrictions and limitations are recognized under the Constitution as well as International Human Right Laws. Counsel stated that restriction is not the same as prohibition. Counsel submitted that where you can restrict or limit a fundamental right under the prescribed conditions, you cannot prohibit or expunge a fundamental right. It was further submitted that the same sex Marriage


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(Prohibition) Act is a law made pursuant to Section 45 of the Constitution. Counsel stated that it is a clear intendment of the Constitution that where Human Rights offend public morality or the interest of the people, the public interest and morality must outweigh the fundamental rights, leading to the possible restriction or limitation of the right. However where such limitations have been recognized by laws made pursuant to the provisions of the 1999 Constitution of the Federal Republic of Nigeria, it cannot lead to total prohibition or abrogation or expunging of a fundamental right. Such is not envisaged by section 45 of the 1999 Constitution and international instruments to which Nigeria is a party Notwithstanding the above stated, the LGBT community should have the ability to form and join organizations that enable people to meet, organize, share ideas, protect their health and other issues affecting its community as well as engage in advocacy.

12.06 In opposition to the Defendants/Applicants' Notice of preliminary objection is the Plaintiff's Written address which was dated the 21st day of July, 2020 but filed on the 22nd day of July, 2020 wherein the Plaintiff adopts the Defendants/Applicants' sole issue formulated for determination which is:

Whether this Honourable Court has the requisite jurisdiction to entertain the Plaintiff/Respondent's Originating Summons dated the 24th of February, 2020.

12.07 It was submitted that with respect, that the jurisdiction conferred on the High Court of a State or of the Federal Capital Territory to entertain matters arising from the breach of the provisions of the Same Sex Marriage (Prohibition) Act, 2013, as contained in Section 6, is limited to breach of the provisions of the Act only. Counsel also submitted that the


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said section confers criminal jurisdiction and not civil, on the High Court of a State or of the Federal Capital Territory to hear and determine criminal cases emanating from the breach of the Law/Act. According to Counsel the Plaintiff's suit is not one alleging breach of the provisions of Same Sex Marriage (Prohibition) Act, 2013, but seeking an enforcement of the Plaintiff's constitutionally guaranteed rights.

12.08 Counsel referred to the case of **FEDERAL UNIVERSITY OF TECHNOLOGY MINNAA & ORS v. BUKOLA OLUWASEUN OLUTAYO (2017) LPELR-43827 (SC)** where the Apex Court per Kekere-Ekun JSC held that in the case of fundamental rights infringement that:

What this means is this, both the Federal High Court and the High Court of a State have concurrent jurisdiction. An application may therefore be made either to the judicial division of the Federal High Court in the State or the High Court of the State in which the breach occurred, is occurring or about to occur." (Pp. 27-32, Paras. D-E)

12.09 Counsel leaning on the decision of the Apex Court above, and contrary to the submissions of the Defendants/Applicants, submitted that this Honourable Court has jurisdictional competence to hear and determine the Plaintiff's suit filed pursuant to Section 46 (1) & (2) of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) where Plaintiff alleges that Section 4(1), Section 5(2) and partly Section 5(3) insofar as it provides that a "person or group of persons who (...) supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment", contravene, and/or are likely to contravene its fundamental rights as

guaranteed in the Constitution and in the African Charter on Human and Peoples' Rights, particularly Sections 39 and 40 of the Constitution and Article 8, 9, 10 and 11 of the African Charter.

12.10 It was the submission of learned silk that this Honourable Court has the requisite jurisdiction to hear and determine Plaintiff's suit. The Court was urged to discountenance and dismiss all submissions of the Defendants/Applicants made in Paragraphs 4.1 - 4.2.2 of their written address in support of the Notice of Preliminary Objection and hold that the Honourable Court is seized of jurisdiction over Plaintiff's suit.

13.00 According to Counsel the Defendants/Applicants submitted that, "Matters relating to Marriage do not come within the Exclusive Jurisdiction of the Federal High Court provided for under Section 251 of the 1999 Constitution (As Amended)". On this point, Counsel submitted that the Plaintiff did not and has not advanced pleadings/facts and/or legal submissions in its case in relation to or in support of Marriage. Plaintiff's claims do not include a prayer for Marriage.

13.01 It was further submitted that the Plaintiff is before the Honourable Court because it alleges contravention or likely contravention of its fundamental rights, particularly Sections 39 and 40 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and Articles 8, 9, 10 and 11 of the African Charter on Human and peoples Rights, by the provisions of Sections 4(1), 5(2) and partly 5(3) of the Same Sex Marriage (Prohibition) Act, 2013.

13.02 The Court was urged to completely discountenance and dismiss Defendants/Applicants' submissions in Paragraphs 4.3 - 4.3.2 of their written address, and hold that the Honourable Court has subject matter

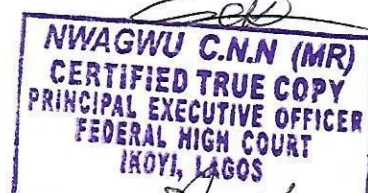
jurisdiction over Plaintiff's suit as same did not advance pleadings/facts as well as legal submissions about or in support of Marriage. Plaintiff claims do not include a prayer for Marriage.

13.03 According to Counsel the Defendants/Applicants in support of their objection to the Court's jurisdiction, is contained in Paragraphs 4.5 - 4.5.2 of their written address where they submitted that, "The National Assembly in which the legislative powers of the Federal Republic of Nigeria for making laws for the peace, order and the good governance of the Federation is vested in, is not made a party to this suit"

13.04 In response to the above assertion Counsel submitted that the National Assembly is not a Necessary Party to the suit in that the question to be settled is not one which cannot be effectually and completely settled unless the National Assembly is made a party, it was further submitted that the Plaintiff's suit made no allegation against the National Assembly and therefore was under no obligation to join the National Assembly as a Party to the suit. Counsel also submitted that the issue of lack of fair hearing would not arise since no allegations have been made against the National Assembly requiring it to be heard.

13.05 It was submitted that no proceedings shall be defeated by reason of misjoinder or non-joinder of parties on the ground of lack of jurisdiction or competence of the Court. On this, reference was made to the provisions of Order 9 Rules 14 (1) of the Federal High Court (Civil Procedure) Rules, 2019, which reads

14. (1) No proceeding shall be defeated by reason of misjoinder or non-joinder of parties, and a Judge may deal with the matter in controversy so far as regards the rights and interest of the parties actually before him.



13.06 Counsel referred to the case of **COTECNA INTL LTD v. CHURCIGATE NIG LTD & ANOR (2010) LPELR-897 (SC)** where the Apex Court reiterated the law as follows:

In order to decide the effect of non-joinder or mis joinder of a party, this Court per Oputa, SC in Chief Abusi David Green v. Dr. E. T. Dublin Green (1987) 3 NWIR (Pt. 60) 480 maintained that the Court should ask itself the following questions:-

- (a) Is the cause or matter liable to be defeated for non-joinder?
- (b) Is it possible to adjudicate on the cause or mater unless the 3rd party is added as a defendant?
- (c) Is the 3rd party a person who should have been joined in the first instance?
- (d) Is the 3rd party a person whose presence before the Court as a defendant will be necessary in order to enable the Court to effectually and completely adjudicate or settle all the questions involved in the cause or matter?

13.07 Counsel submitted that the answer to the above questions is definitely negative because in all, the case of the Plaintiff can be effectually and completely settled in the absence of the National Assembly. It was submitted that the assertion of the Defendants/Applicants with respect to the need to have joined the National Assembly is misconceived and same be discountenanced and dismissed.

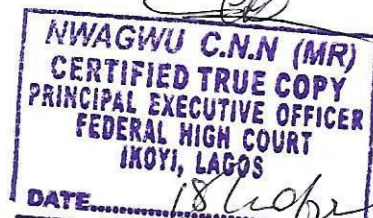
13.08 In further submission, counsel stated that the Plaintiff has not only shown interest and legal right but also sufficient interest to institute this suit. On this position of law, Counsel referred to the Apex Court case of **OWODUNNI v. REGISTERED TRUSTEES OF C.C.C. (2000) 10 NWLR (PT.675) 312 AT PP.354-355 PARAS. H-B.**



13.09 It was submitted that it will be presumptuous at this level for the Defendants/Applicants to ask the Honourable Court to determine the legal existence of the Plaintiff and declare it an illegal Organisation at the point of a Preliminary Objection. Counsel also submitted that that will be tantamount to denial of fair hearing or denying the Plaintiff the opportunity of being heard on the alleged illegality of the Same Sex Marriage (Prohibition) Act. The Court was urged to completely discountenanced the submissions of the Defendants/Applicants as well as authorities cited as same is misconceived, erroneous and inapplicable to the case of the Plaintiff.

13.10 According to Counsel the process of passing any law, including the Same Sex Marriage (Prohibition) Act, (SSMPA), is concluded by Presidential assent which is done by the President as the head of the 1st Defendant/Applicant. Counsel submitted that the 1st Defendant/Applicant was directly involved in the passage of the Act. He also stated that it is strange for the 2nd Defendant/Applicant to argue that it has no interest in SSMPA and therefore. ought not to be joined as a party in the suit.

14.00 In conclusion, Counsel based on totality of the foregoing and all the submissions made herein, urged the Honourable Court to resolve the sole issue raised herein in favour of the Plaintiff and against the Defendants/Applicants, and to hold that the Court has the requisite jurisdiction to hear and determine Plaintiff's suit. Counsel urged the Court to dismiss Defendants/Applicants Notice of Preliminary Objection for lacking in merit and to proceed to determine the Plaintiff's suit on the merits.



14.01 In this originating summons Defendants brought a Notice of preliminary objection dated 30th Day of March, 2020 but filed on the 5th Day of June, 2020. The Objection challenges the Jurisdiction of this Honourable Court to entertain the Originating summons.

14.02 The issue of Jurisdiction is the lifeblood of any adjudication. It is so fundamental that it must be resolved before any other step is taken in the proceedings. Jurisdiction goes to the competence of the Court or tribunal to entertain a cause or matter. Any proceedings conducted without Jurisdiction would amount to a nullity and any decision reached therein is liable to be set aside. See **SPDC LTD v. ANARO (2015) 12 NWLR (PART 1472) Pages 122 at 185 Paragraph G-H.**


14.03 In his address, Counsel for the Defendant/Applicants raised the sole, issue

Whether this Honourable Court has the requisite Jurisdiction to entertain the Plaintiff/Respondent's Originating Summon dated 24th of February, 2020.

14.04 ON WHETHER IT IS THE STATE HIGH COURT THAT has Jurisdiction OVER ALL MATTERS ARISING FROM BREACH OF PROVISIONS OF THE SAME SEX MARRIAGE (PROHIBITION) ACT, 2014.

14.05 I have noted the arguments of Counsel on this issue. The kernel on which this ground of objection is based on, is the provisions of SECTION 6 OF THE SAME SEX MARRIAGE (prohibition) ACT 2014- that section states that:

“The High Court of a state or the Federal Capital Territory shall have jurisdiction to entertain matters arising from the breach of the provisions of this Act”


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14.06 Applicant's counsel submission is that any questions relating to the consequences of breach of the same Act, is a matter arising from the provisions of the Act for which only the state High Courts or FCT High Court have Jurisdiction. I am in disagreement with this submission and I agree with Plaintiffs' counsel submission that SECTION 6 (Supra) is limited to breach of the provisions of the Act Only. Also the section confers criminal Jurisdiction and not civil Jurisdiction on the High Court of a State or Federal Capital Territory to hear and determine criminal cases emanating from breach of the Act. The operative words are "breach of the provisions of this Act", also, the instant suit is not one emanating from the same sex Act instead this is a matter seeking for enforcement of fundamental Rights guaranteed by Chapter IV of the CONSTITUTION OF FEDERAL REPUBLIC OF NIGERIA 1999 (As Amended). SECTION 46 thereof which confers Jurisdiction on the Federal High Court amongst other High Courts and FCT. This ground of objection is therefore resolved in favour of the Plaintiff/Respondents.

14.07 The second ground of objection is that MATTERS RELATING TO MARRIAGE DOES NOT COME WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL HIGH COURT AS PROVIDED FOR UNDER SECTION 251 OF THE 1999 CONSTITUTION (As Amended) I have noted counsel's submission in this regard and straight away I shall state the position of the Law hereunder.

14.08 In the case of **IHIM v. MADUAGWU (2021) 5 NWLR (PART 1770) SC 584, Page 626 Paragraph B-D B-** Apex court held thus "the provisions in SECTION 46 (1) OF THE CONSTITUTION are clear and unambiguous and must therefore be ascribed their ordinary meaning so, where both the Federal High Court and State High Court exist in a State,

they have concurrent Jurisdiction in a matter pertaining to enforcement of Fundamental rights. The reason for this is because of the essential nature of the fundamental rights which must be jealously protected. Therefore, framers of the constitution deemed it fit to ensure that no clog is placed in the path of a citizen seeking to enforce his Fundamental rights...”

14.09 In the instant suit, the Plaintiff alleges contravention or likely contravention of its fundamental right particularly SECTION 39 AND 40 OF THE CONSTITUTION OF FEDERAL REPUBLIC OF NIGERIA 1999 (As Amended) ARTICLES 8, 9, 10 AND 11 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHT by provisions of SECTION 4 (1), 5 (2) and PARTLY 5 (3) OF THE SAME SEX MARRIAGE (PROHIBITION) ACT 2013. This Honourable Court therefore has concurrent Jurisdiction with the High Court of a State and the FCT. to entertain this action.

14.10 The 3rd ground argued by Applicant’s Counsel in his address ALL FUNDAMENTAL HUMAN RIGHTS ENTRENCHED IN CHAPTER IV OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA INCLUSIVE OF SECTION 39 AND 40 are all qualified rights not absolute. This ground of objection is not preliminary in nature but ought to be considered in the determination of the originating summons.

15.00 The 4th ground of objection is that THE NATIONAL ASSEMBLY IN WHICH THE LEGISLATIVE POWERS OF THE FEDERAL REPUBLIC OF NIGERIA FOR WHICH THE LEGISLATIVE POWERS OF THE FEDERAL REPUBLIC OF NIGERIA FOR


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MAKING LAWS FOR THE PEACE, ORDER AND THE GOOD GOVERNANCE IS VESTED IN, IS NOT MADE A PARTY TO THIS SUIT.


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15.01 I have noted Counsel's argument on this ground without much "Ado" ORDER 9 RULE 14 (1) OF THE FEDERAL HIGH COURT (civil procedure) RRULES 2019 States

"No proceeding shall be defeated by reason of misjoinder or non joinder of parties, and a Judge may deal with the matter in controversy so far as regards the rights and interests of the parties actually before him"

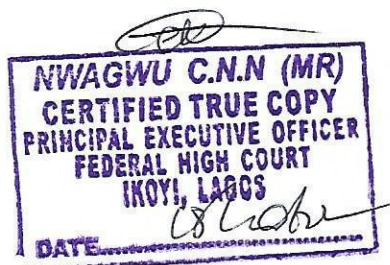
15.02 Also, in the case of **OKWU v. UMEH (2016) 4 NWLR (PART 1501) Page 120 at 143 Paragraph F** the Court was of the view that non joinder of a necessary party in a suit is an irregularity that does not affect the competence of Jurisdiction of the Court to adjudicate on the matter before it. See also **ANYANWOKO v. OKOYE (2010) 5 NWLR (PART 1188) Page 497 SC at 519- 520 Paragraph H-B; BELIEVERS FISHERIES DREDGING (NIG) LTD v. V. T. T. B TRUSTEED LTD. (2010) 6 NWLR (PART 1189) Page 185 at 202 Paragraph D-H.**

15.03 Besides all of the above position of the Law, I am of the view that in the circumstance of this case the National Assembly is not a necessary party. A necessary party is that person whose presence is essential for the effectual and complete determination of the issues before the Court. It is a party in the absence of whom the whole claim cannot be effectually and completely determined see. **ADC v. BELLO (2017) 1 NWLR (PART 1545 Page 112 at 136 Paragraph F-H; OKWU v. UMEH (Supra) APUGO & SONS LTD v ORITHOPAEDIC HOSPITAL**


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- 15.04 Granted that by virtue of SECTION 4 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (As Amended) legislative powers of the Federal Republic of Nigeria is vested in the National assembly however by the provision of SECTION 1 (3) OF THE CONSTITUTION, if any Law is inconsistent with the provisions of this constitution, this constitution should prevail and that other Law shall to the extent of the inconsistency be void. The judicial power to declare an enactment of the National Assembly enures to the Courts pursuant to the provision of SECTION 6 (6) OF THE CONSTITUTION thus the presence of the National Assembly makers of the Law is not necessary and that judicial power can be effectively and effectually exercised in the absence of the National Assembly in any such proceeding where an enactment of National Assembly is called into question.
- 15.05 ANOTHER GROUND of the objection is that THE PLAINTIFFS LACKS LOCUS STANDI to institute this suit as the enactment and provisions of the same sex marriage (prohibition) Act 2014 vitiates the objectives of the Plaintiff organization thereby rendering the Plaintiff an illegal organization.
- 15.06 In the determination of whether a party has legal capacity or locus standi to institute an action it is the Plaintiffs statement of claim that the Court should examine.



- 15.07 In paragraph 6 of the Plaintiffs statement of claim they have averred that they are a registered organization with corporate affairs commission and attached copy of their certificate of incorporation as Exhibit AM 1.
- 15.08 In paragraph 7 thereof they have stated the objectives of the organization which encompasses the subject matter of this suit.
- 15.09 Paragraphs 6 - 14 of the Plaintiff Affidavit in support of their originating Summons establishes that the Plaintiff have sufficient interest and legal right to institute this action.
- 15.10 The Plaintiff was incorporated on the 31st day of August, 2016 and the SAME SEX MARRIAGE (PROHIBITION) ACT, came into effect in 2013; I agree with submission of Plaintiff/Respondents Counsel that it is preposterous to insinuate that the same laws the Plaintiff alleges contravene or likely to contravene its fundamental rights particularly SECTIONS 39 AND 40 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999) (as amended) and Articles 8,9, 10 and 11 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE RIGHTS is to operate retrospectively to void Plaintiffs legal personality and the capacity to institute or maintain this action before the Honourable Court.
- 16.00 I am also in agreement that it will be presumptuous at this level for the Defendant/Applicants to ask the Honourable Court to determine the Legal existence of the Plaintiff and declare it an illegal organisation at the point of a preliminary objection. That will be tantamount to denial of fair hearing taking into consideration that if the Defendants intends that the Plaintiff be declared an illegal organization they ought to institute an action giving the Plaintiffs an opportunity to respond, in any case the

Plaintiff being a legal personality only a Court of competent jurisdiction can judicially and judiciously declare it illegal not by the Defendants unilateral declaration. The Plaintiffs therefore have locus standi to institute this action.

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16.01 The last ground is that the DEFENDANTS/APPLICANTS ARE NOT PROPER and/or NECESSARY PARTIES- I have examined the submission of the Applicants counsel and the issue have herein before canvassed and dealt with in considering the issue of non-joinder of the National Assembly and locus standi of the Plaintiff to institute the action the Plaintiff is a registered corporate entity and its aims and objectives are within the scope of this action to give them sufficient interest. Besides by virtue of PREAMBLE 3 (b) FREP RULES 2009

“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 applications on behalf of any potential Applicant.....”

16.02 In all of this consideration, the Notice of preliminary objection as filed by the Defendants is of no merit and accordingly dismissed.

16.03 ON THE ORIGINATING SUMMONS

16.04 The Plaintiff submits the following issues for determination:

1. Whether the challenged provisions (or any of them) are prima facie inconsistent with the Plaintiff fundamental rights, and in particular those guaranteed by SECTIONS 39 AND 40 OF THE


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CONSTITUTION AND 8, 9, 10 AND 11 OF THE AFRICAN CHARTER.

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2. If the answer to the first issue is yes, whether such challenged provisions (or any of them) are reasonably justifiable in a democratic society in accordance with SECTION 45 OF THE CONSTITUTION.

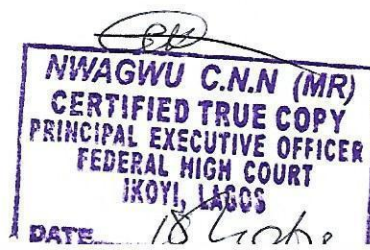
16.05 Before I proceed it is pertinent to note that the Defendants did not file any counter Affidavit to the originating Summons but only filed a notice of preliminary objection. On the implication of this the apex Court in the case of **CBN v. INTERSTELLAR COMM. LTD (2018) 7 NWLR (PART 1618)** held thus:

“A Defendant who decides to challenge an action by way of a preliminary objection without filing a defence to the substantive claim is deemed to have conceded that all questions of facts as contained in the statement of claim are correct”

16.06 However, in the course of arguing his notice of preliminary objection counsel placed an argument touching on legal issues in the originating summons. In his address counsel set up the provisions of SECTION 37, 38, 39, 40 AND 41 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (as amended) in defence of this action the SECTION provides

16.07 Nothing in SECTION 37, 38, 39, 40 AND 41 OF THE CONSTITUTION shall invalidate any Law that is reasonably justifiable in a democratic society

- a. In the interest of defence, public safety, public Order, public morally or public health, or



- b. For the purpose of protecting the rights and freedom of other persons.

16.08 Counsel submit that given the above provisions of the 1999 constitution, the rights to freedom of Association and expression as envisaged by the Plaintiff are not absolute to the extent that it is against a Law of the National Assembly formulated by the creation of the SAME SEX MARRIAGE (prohibition) ACT 2014 which is a Law to protect public morality that is reasonably justifiable in Nigeria. Counsel cited the case of **CHUKWUMA v. COP (2005) 8 NWLR (PART 927) 278 at 287 CA** in support of his contention. Counsel also cited ARTICLE 18 IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR).

16.09 Counsel contends that the intention of the constitution as to the scope and meaning of public morality means the regulation of sexual matters including prostitution and homosexuality but also matters of dress and nudity pornography, acceptability in social terms of cohabitation before marriage and the protection of children.

16.10 Counsel referred to SECTION 18 OF THE INTERPRETATION ACT which defines marriage as follows:

“Monogamous marriage” means a marriage which is recognized by the Law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of marriage”.

17.00 Counsel then submits that the interpretation of marriage has long been interpreted with the aim of accommodating the creation of the same sex marriage (prohibition) Act 2014 by the National Assembly which is to

clearly reflect the meaning of marriage within the confines of public morals of the Nigerian people and therefore to regulate sexual behaviour in a democratic society. Counsel submits that the exception of public morality (within the intention of the constitution Applies to, SECTION 39 AND 40 OF THE 1999 CONSTITUTION and therefore expunges any right-envisaged by the Plaintiff as it relates to the creation of the same sex marriage (prohibition) Act, 2014.

17.01 Fundamental Rights under review are not absolute as legitimate restrictions and limitations are recognized under the constitution as well as international Human Rights Laws but that restriction is not the same as prohibition. Whereas you can restrict or limit a fundamental right under the prescribed condition, you cannot prohibit or expunge a fundamental right. The same sex marriage (prohibition) Act is a Law made pursuant to SECTION 45 OF THE CONSTITUTION. It is clear intendment of the constitution that where Human Right offend public morality or the interest of the people, the public interest and morality, must outweigh the fundamental Right, leading to the possible restriction or limitation of the right. However where such limitations have been recognised by Laws made pursuant to the provisions of the 1999 constitution of the Federal Republic of Nigeria, it cannot lead to total prohibition or abrogation or expunging of a fundamental right. Such is not envisaged by section 45 of the 1999 constitution and international instrument to which Nigeria is a party.

17.02 In the case of **DIN v. AFRICAN NEWSPAPERS OF NIG LTD (1990) LPELR 947 (SC)** the Court declared that under the constitution it was clear that liberty of thought and freedom of expression were paramount, the Court noted that the freedom guaranteed under

SECTION 39 of the CONSTITUTION includes the freedom to hold an opinion and pass information without interference and that this freedom presupposes free flow of opinion and ideas essential to sustain the collective life of the citizenry. The Court however, stressed that the right provided under Section 39 is not an open ended or absolute right, the right is qualified and therefore subject to some restriction by the provisions of SECTION 45 of the constitution. See also **THE REGISTERED TRUSTEES OF NATIONAL ASSOCIATION OF COMMUNITY HEALTH PRACTITIONERS OF NIGERIA & 2 ORS v. MEDICAL AND HEALTH WORKERS UNION OF NIGERIA (2008) 2 NWLR (PART 1072) 575 at 603 Paragraph C.**

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17.03 In the case of **ABDULKAREEM v. LSG (2016) ALL FWLR (PART 850) Page 101** the CA held that

“Fundamental Human Right are not ordinary rights , they are elevated right, some of them have their origin in international conventions or treaties. They are so special a class of rights and no person shall be deprived of the enjoyment of any such rights except by the proper observance of due process of Law”.

17.04 When fundamental right offends public morality or interest, the public interest outweighs the personal right thus the provisions of SECTION 4 (1) 5 (2) AND 5 (3) OF THE SAME SEX MARRIAGE (prohibition) ACT 2011 may not be out of place in the interest of the public morality and beliefs of the Nigeria people. However considering the fact that the Plaintiffs are persons naturally predisposed to LGBTI preferences as human being out of choice of theirs, criminalizing such natural predisposition or totally prohibiting same rather than restriction seems to be an over kill and excessive or disproportionate action by the Law.

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17.05 I have gone through the eloquent submission of Counsel for the Plaintiffs which is very informative and I agree that the rights and freedoms invoked by the Plaintiff are universally recognized. The questions set out in the originating summons is answered in favour of the Plaintiffs and the reliefs sought are hereby granted as prayed

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HON. JUSTICE A LEWIS-ALLAGOA
JUDGE
5/10/2022

PARTTIES: Parties are absent

APPEARANCE:

Oba Nsugbe, QC (SAN) with Isreal Usman and Chizelu Emejulu for the Plaintiffs

Olaide Oduoluwo-Balogun with Oludare Ibilola, Kehinde Otuyemi and Bakreem Ajoke for the Respondent

E. Daffe with V.C Onwudiwe holding brief of National brief of National Human Right Commission (Amicus Courier)

Dr. M.O Ubani for the Public interest and Development Law of Nigeria Bar Association (Amicus Courier)

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