

SUPREME COURT OF NIGERIA
MONDAY 21ST OCTOBER, 2002. SC. 12/2002
CORAM:- M. E. OGUNDARE, U. MOHAMMED, A. I. IGUH,
S. O. UWAIFO, A. O. EJIWUNMI, E. O. AYOOLA, JJSC

FESTUS KEYAMO APPELLANT
AND
HOUSE OF ASSEMBLY, LAGOS RESPONDENTS
STATE & ORS

COURT PROCESSES - Originating summons - Absence of affidavit
- Effect - Without verification by affidavit evidence of facts alleged -
The summons is incompetent and liable to be struck out (H1)

FACTS

Before the High Court of Lagos State, plaintiff/appellant filed this originating summons, on which he alleged a number of facts, praying the Court for a perpetual injunction and a mandatory order of certiorari to remove a certain proceeding held by Lagos State House of Assembly in relation to allegation of certificate forgery leveled against the Governor of Lagos State – Sen. Bola Tinubu.

There was no affidavit in support of the originating summons even though there were obviously facts, which appellant intended to rely on in the nature of evidence. Respondents raised a preliminary objection to the competence of the action and the locus standi of appellant. The trial court upheld the objection and struck out appellant's suit. His appeal to the Court of Appeal was dismissed. Hence appellant filed appeal at the Supreme Court.

ISSUE FOR DETERMINATION

Whether this action commenced by originating summons is competent.

HELD (Unanimously dismissing the appeal per
OGUNDARE JSC)

Originating summons - Absence of affidavit - Effect

**1. Without the verification by affidavit evidence of the facts
alleged in the originating summons, the summons was incom-**

petent and was rightly struck out by the trial court. Furthermore, looking at the unverified facts they seem contentious and it is doubtful if the Appellant could have come by way of originating summons. This is only an observation and, in the absence of affidavit evidence, I make no decision on that.
(p. 3016)

NOTABLE POINT OF INTEREST

IGUH JSC

1. Originating summons applies where facts are settled

The law is well settled that originating summons may be employed to commence an action where the issue involved is one of the construction of a written law, instrument, deed, will, or other document or some question of pure law is involved or where there is unlikely to be any substantial dispute on issues of fact between the parties. This is not such a case as there are clearly facts averred which are likely to be contentious in the cause. (p. 3017)

REPRESENTATION

Festus Keyamo in person

Fred Agbaje with Mrs. Ayodele (Director - Legal Department, House of Assembly, Lagos State), for the respondents

RULES REFERRED TO

RSC of England, 0.28

JUDGMENT BY OGUNDARE JSC

This is a frivolous appeal. Appellant approached the Court by way of originating summons in which he alleged a number of facts - 15 in all but adduced no evidence, oral or written to verify these facts. The trial court on that ground, among others, considered his summons incompetent and struck it out. On his appeal to the Court of Appeal that Court affirmed that decision.

We see no reason to depart from the concurring decisions of the two Courts below. ***Without the verification by affidavit evidence of the facts alleged in the originating summons, the summons was incompetent and was rightly struck out by the trial***

court. Furthermore, looking at the unverified facts they seem contentious and it is doubtful if the Appellant could have come by way of originating summons. This is only an observation and, in the absence of affidavit evidence, I make no decision on that.

In conclusion, I dismiss this appeal and affirm the decision of the Court below which, in turn, affirmed that of the trial High Court of Lagos State. I award N10,000.00 costs to the Respondents.

MOHAMMED JSC

The Respondents' counsel is not called to make any reply. I agree with my Lord, Ogundare, JSC, that this appeal is devoid of any merit and for the reasons given in the judgment just read the appeal is dismissed with N10,000.00 costs in favour of the Respondents.

IGUH JSC

I agree entirely with the judgment just delivered by my learned brother, Ogundare, JSC, and I, too, am of the view that there ought to have been affidavit evidence in verification of the diverse contentious issues at fact set out in support of the appellant's originating summons before the court.

The law is well settled that originating summons may be employed to commence an action where the issue involved is one of the construction of a written law, instrument, deed, will, or other document or some question of pure law is involved or where there is unlikely to be any substantial dispute on issues of fact between the parties. This is not such a case as there are clearly facts averred which are likely to be contentious in the cause. Such facts have not been verified by any affidavit evidence and I think that both courts below are right in holding that the present proceeding is incompetent.

There is no substance in this appeal and I, too, dismiss it with costs as assessed in the leading judgment.

UWAIFO JSC

The appellant filed an originating summons on which he stated a number of facts. He then asked for three declaratory reliefs, an order of perpetual injunction and a mandatory order in the form of certiorari to remove a certain proceeding held by the Lagos State House of Assembly in relation to the Governor of Lagos State, Senator Bola Ahmed Tinubu.

There was no affidavit in support of the originating summons even though there were obviously facts, which the appellant intended to rely on in the nature of evidence. A preliminary objection was taken to the competence of the originating summons and as to the locus standi of the appellant. The trial court upheld the objection and this was found to be correctly decided by the lower court on appeal.

Before this court, the first issue is as to the competence of the action. After listening to argument from the appellant (in person) I had no difficulty in resolving the said issue. There is no doubt that this originating summons ought to be supported by affidavit. Failure to do so makes it incompetent: see Order 28, RSC of England. I agree with my learned brother, Ogundare, JSC. I too find no merit in the appeal and therefore dismiss it with N10,000.00 costs against the appellant.

EJIWUNMI JSC

I have had the privilege of reading the records and the briefs of argument filed by the parties before the hearing.

It is manifest that the main question for determination is whether this action commenced by originating summons is competent. The applicant in support of this summons had deposed to a 15-paragraph affidavit in which he identified himself as a legal practitioner. He also went on to allege that some clients had enquired from him as to what they should understand, and indeed should do in their quest for Governorship position. He then alleged against the governor of Lagos State that he had forged certificates etc. to qualify for the office of Governor.

To support his conferment in office, a five-man panel was set up by the Lagos State House of Assembly. That panel having purportedly examined the allegations, ruled in favour of the Governor

in that they held that there was no merit in the several allegations made against the Governor.

The High Court ruled that the summons was incompetent, as there is no affidavit evidence in support of the several allegations. This is affirmed by the Court of Appeal.

I see no merit in this appeal and it is also dismissed by me. I also agree with the judgment just read by Ogundare, JSC. N10,000.00 cost to the Respondents.

AYOOLA JSC

In the leading judgment of the Court of Appeal delivered by Galadima, JCA., that court dismissed the appellant's appeal on the ground inter alia that a careful perusal of the reliefs sought by the appellant before the lower court clearly revealed that in no way could the trial court award the reliefs without a factual basis through an affidavit presented before the court. The court rejected the appellant's conclusion that he was simply asking for the interpretation of the Constitution. Having looked at the reliefs sought the court below held that the originating summons not being supported by an affidavit was incompetent. I think the court below came to a right decision. Where the reliefs sought in proceedings commenced by originating summons are predicted on facts, such should be brought before the court by affidavit evidence. It is only then that the court can know whether the facts are non-contentious so as to determine the propriety of commencing the proceedings by originating summons. Besides, no reasonable court will grant a relief predicated on the existence of facts without having the facts put before it, it does not matter whether the proceedings were commenced by originating summons or otherwise. The appeal is without merit and is dismissed with N10,000.00 costs to the respondents.