

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA**

**BEFORE HIS LORDSHIP: JUSTICE SALISU GARBA
COURT CLERKS: FIDELIS T. AAYONGO & OTHERS
COURT NUMBER: HIGH COURT TWO (2)
CASE NUMBER: FCT/HC/M/9406/2019
DATE: 27TH JANUARY, 2020**

BETWEEN:

1. AJEF AFE NIGERIA LIMITED
2. ESTEMOKHAI JOHN



CLAIMANTS/RESPONDENTS

AND

1. NIGERIA CUSTOMS SERVICE BOARD
2. COMPTROLLER GENERAL OF CUSTOMS
3. HON. ATTORNEY GEN. OF THE FED.



**DEFENDANTS/RESPONDENTS
DEFENDANT/APPLICANT**

Parties absent.

E.S. Maji appearing with E.C. Imezurike Esq. for the Claimant.

Abdullahi Abubakar Principal (State Counsel Federal Ministry of Justice) for the 3rd Defendant.

Claimant's Counsel – The matter is slated for ruling. We are ready to take same.

R U L I N G

The court is to rule upon a Notice of Preliminary Objection filed by the 3rd Defendant/Applicant dated 8/10/2019 brought pursuant to Section 5 of the Arbitration and Conciliation Act 1990 and under the inherent jurisdiction of this court.

In the application, the 3rd Defendant/Applicant is challenging the jurisdiction of this court to hear and entertain this suit as constituted.

The grounds upon which this objection is sought are as follows:

- (I) There is an Arbitration Clause contained in the Contract Agreement.
- (II) The Claimants did not invoke and/or exhausted the Arbitration Clause.
- (III) The Claimants did not resort to Arbitration as expressly contained in the Contract Agreement before instituting the instant suit.
- (IV) The failure of the Plaintiff to take the step above has robbed this Honourable Court of the jurisdiction to entertain the matter.

In support of the application is a 5-paragraph supporting affidavit dated 8/10/2019. Also filed is a 5-paragraph Further and Better affidavit dated 16/10/19 all deposed to by Harachi Uche, a Litigation Officer in the Federal Ministry of Justice Abuja. Attached to the Further and Better affidavit is a document marked Exhibit FMOJ1. Reliance is placed on all the paragraphs of the two affidavits.

Learned counsel to the 3rd Defendant/Applicant filed a written address dated 8/10/2019 wherein counsel formulated a sole issue for determination, to wit:

“Whether this Honourable Court has jurisdiction to entertain this suit having regards to Section 5 of the Arbitration and Conciliation Act 1990”

On this issue, it is the submission of counsel that by virtue of Section 5, the court has a jurisdiction to stay proceedings pending the

determination of the arbitration. See *SCOA (NIG) PLC v STERLING BANK PLC (2016) LPELR*.

It is submitted that when parties enter into agreement and there is an arbitration clause whereby the parties must first go for arbitration before trial in court, it is natural for the Defendant in a case where the other party has filed a suit to ask for a stay of proceedings pending arbitration.

It is further submitted that so long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by the parties. See *SINO-AFRIC AGRICULTURE & IND. COMPANY LTD & ORS v MINISTRY OF FINANCE INCORPORATION & ANOR (2013) LPELR – 22370 (CA)*. Court is urged to decline jurisdiction.

In opposition to the objection, the Claimant/Respondent filed a 7-paragraph counter affidavit dated 16/10/2019 deposed to by John Adams the Litigation Secretary in the law firm of Messrs Samuel O. Zibiri, SAN & Co.

Learned counsel equally filed a written address dated 16/10/19 wherein counsel formulated two (2) issues for determination:

1. Whether this Honourable Court is empowered by law to entertain this suit in light of the provision of the Arbitration and Conciliation Act and the totality of the facts and circumstances of this case.
2. Whether a person not privy to a contract can benefit or seek to enforce rights contained therein.

On Issue 1, it is the submission of counsel that once the law has laid down certain conditions precedent which must be fulfilled before a matter can be initiated or empowers the court to assume jurisdiction to handle same, once such condition precedent is shown not to have been complied with the court cannot assume jurisdiction, and if did, whatever is the outcome of such proceeding no matter how beautifully conducted, becomes a nullity and of no legal effect whatsoever. See EMEKA v OKOROAFOR (2017) 11 NWLR (Pt 1577) 410.

It is the submission that for an arbitration clause to become enforceable, such that the court will be expected to decline jurisdiction, the said clause must be direct, unequivocal and mandatory. See NEURAL PROPERTIES LTD v UNIC INS PLC (006) 5 NWLR (Pt 1505) 374 at 384 Paras H – A.

It is submitted that the Arbitration Clause in the agreement between the Claimants and the 1st and 2nd Defendants is devoid of the features enunciated in the Clause. Court is urged to hold that the inability of the said Arbitration Clause to be explicit on how to go about arbitrating has given parties to the contract the right to approach the court rather than going through arbitration.

It is further submitted that in the unlikely event that the court will find that the arbitration clause is mandatory, clear and unambiguous, the court is urged so hold that the steps taken by the 3rd Defendant/Applicant in this suit is tantamount to waiving the right of submitting to arbitration before approaching the court. See KURUBO v ZACH-MOTISON (NIG) LTD (1992) 5 NWLR (Pt 239) PP 117 – 118 Paras H – A.

It is submitted that assuming but not conceding that the court is inclined to agree with the 3rd Defendant, on first exhausting arbitration, the proper order to make is to stay proceedings while parties explore arbitration as rightly canvassed by the 3rd Defendant's Counsel.

On Issue 2, it is the submission that the contract is clearly between the Claimant and the 1st and 2nd defendants. The 3rd Defendant is neither privy to the said contract nor has any enforceable right or obligation therein and as such cannot seek to enforce the contents of the contract or insist on its observance. Court is referred to paragraphs 5(a) of the 3rd Defendant's Statement of Defence.

It is submitted that the 3rd Defendant was sued as a nominal party due to its position as the Attorney General and Chief Law Officer of the Federal Government. See *EZOMO v A.G. BENDEL* (1986) NWLR (Pt 35 & 36) 448 at 449 Para C. Court is urged to dismiss the preliminary objection for lacking in merit.

The 3rd Defendant/Applicant's counsel filed a reply on point of law dated 21/10/19 wherein counsel in response to filing this application along side the statement of defence, submitted that the position of the law is that demurer has been abolished by the rules of this Honourable Court and the rules introduced front-loading to ensure that there is no trial by ambush and to expedite the hearing. Court is referred to Order 19 Rule 1, Order 23 Rule 1 & 2 of the Rules of this court and the case of *SKYE BANK v PERONE (NIG) LTD* (2016 LPELR – 41443 (CA)).

It is submitted that the case of KURUBO v ZACH – MOTISON (NIG) LTD (Supra) cited by the Claimant/Respondent's counsel is based on the old uniform rule of the High Court. Therefore filing the Notice of Preliminary Objection together with the Statement of Defence does not amount to taken step in the proceeding.

In response to Issue two as formulated by the Claimants/Respondent's counsel, it is the submission that the 3rd Defendant/Applicant as the Chief Law Officer of the Federation have statutory role to play under Section 84 SCPA in garnishee proceeding as the appropriate officer to contact if money is held by public officer, therefore it has the locus to apply for the matter to be refer to Arbitration in this suit.

I have carefully considered the processes filed and submission of learned on both sides, as rightly stated by the Claimant/Respondent's counsel in paragraph 3.1.1. of his written address, jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the substantive issues submitted to it for adjudication. See MADUKOLU v NKEMDILI (1962) All NLR 587. Learned counsel to the Claimant/Respondent is also in agreement that the issue of jurisdiction can be raised at any stage of the proceeding. As counsel rightly cited the case of PETROJESSICA ENTERPRISES LTD v LEVENTIS TRADING COMPANY LTD (1992) 5 NWLR (Pt 244) 675.

I am in one with the submission of learned counsel to the Claimant/Respondent in paragraph 3.1.2. of Page 6 of his address that it is true and correct position of law that once the law has laid down certain conditions precedent which must be fulfilled before

a matter can be initiated or empowers the court to assume jurisdiction to handle same, once such condition precedent is shown not to have been complied with the court cannot assume jurisdiction and if it did, whatever is the outcome of such proceedings becomes a nullity and of no legal effect whatsoever. In the instant case and as clearly agreed by the parties herein in Article 9 and 12 of the contract agreement dated 31/12/2014 (Exhibit FMOJ1) that where there arise any dispute, it shall be referred to Arbitration as provided in Arbitration and Conciliation Act.

The Claimant/Respondent has not been able with cogent and credible evidence show to this court that parties have attempted to settle their dispute by arbitration. The law is settled that where an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties, by enforcing the arbitration clause as agreed by the parties.

The issue that comes to mind is what order will the court make in the circumstances? In the case of SINO-AFRIC AGRICULTURE & IND COMPANY LTD & ORS v MINISTRY OF FINANCE INCORPORATION & ANOR (Supra) cited by the 3rd Defendant/Applicant's counsel, the court held that the appropriate order to make is a stay of proceedings pending the determination of the arbitration.

It is the contention of the Claimant's counsel that the 3rd Defendant/Applicant has taken steps by filing its statement of defence and as such has waived its right to insist on arbitration. I

am of the firm view that the 3rd Defendant/Applicant's application is timeous and by filing its statement of defence has not robbed it of the right to file this application, as the rules of this court allow for it. See Order 19 Rule 1 and 23 Rules 1 & 2 of our Rules, I so hold.

It is also the contention of the Claimant/Respondent's Counsel that the 3rd Defendant being not privy to the contract has no locus to bring this application.

In paragraph 3.2.13 of the Claimants/Respondent's written address, the Claimant stated clearly that the 3rd Defendant/applicant is an interested party.

Furthermore in paragraph 3.2.8 of the Claimant/Respondent's address, counsel stated that the 3rd Defendant/Applicant was sued for the purpose of making the Federal Government bound by the judgment to be delivered in this suit.

In the light of the above, I hold the considered view that as an interested party to this suit, the 3rd Defendant/Applicant has the locus to bring this application.

In conclusion, I am of the considered view that this preliminary objection is of merit, it is accordingly upheld. I hereby order as follows:

1. The proceedings in this suit are hereby stayed pending the outcome of the Arbitration. Parties are to enter into arbitration as provided by provision of Clause 12 of the Contract Agreement dated 31/12/2014.

2. Parties are given three (3) months from the date of this ruling to report the progress of the arbitration in the interest of justice.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
27/01/2020

3rd Defendant's Counsel – We thank the court for the well considered ruling.

Claimant's Counsel – We thank the court for the ruling.

Court – Case adjourned to 28/4/2020 for report of arbitration.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
27/01/2020