

**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/1657/2019  
DATE: 5<sup>TH</sup> MARCH, 2020**

**BETWEEN:**

<b>1. KUNLE ONITOLO (Trading under the Name and Style Of EJIRETAX ASSOCIATES)</b>	}	<b>CLAIMANTS/RESPONDENTS</b>
<b>2. MRS. MIMI ORUBIBI ADZAPE</b>		

**AND**

<b>1. ARK CITY GLOBAL INNOVATION LTD 2. MR. MARK TERSOO HANMATION 3. MRS. FELICITY FAYUM HANMATION</b>	}	<b>DEFENDANTS/APPLICANTS</b>

Parties absent.

S. Maduka appearing with Ezechukwu Osita Esq. for the Claimant.

S.E. Irabor for the Defendants.

Claimant's Counsel – The matter is for ruling on the Defendant's  
Notice of Preliminary Objection.

## **R U L I N G**

This ruling is premised on a Notice of Preliminary Objection dated 3/12/2019 wherein the Defendants/Applicants seeks for the following:

1. An Order of this Honourable Court dismissing or striking out the suit in its entirety for being incompetent on the ground

that the Honourable Court lacks the requisite jurisdiction to entertain same.

2. Any Further or other order(s) as the court may deem fit to make in the interest of justice.

The grounds upon which the application is brought are as follows:

1. That the Defendants/Applicants are all at Makurdi, Benue State, outside the jurisdiction of this Honourable Court.
2. That the writ of summons and other processes meant for the Defendants/Applicants who are outside the jurisdiction of the Honourable Court lacks the requisite statutory endorsements as stipulated by the Sheriffs and Civil Process Act, 2004.
3. That the cause of action arose wholly in Makurdi, Benue State where all the Defendants/Applicants are also resident.
4. That the Honourable Court does not have requisite territorial jurisdiction in the matter.
5. That the suit is grossly incompetent.

In support of the application is a 7-point supporting affidavit dated 4/12/2019 deposed to by Mark Tersoo Hanmation the 2<sup>nd</sup> Defendant. Reliance is placed on all the points of the said affidavit.

Learned counsel to the Defendants/Applicants filed a written address wherein counsel submitted a lone issue for determination, thus:

***“Whether in the circumstances so far, of this case, the Honourable Court has the competence and jurisdiction to entertain this suit”***

On this sole issue, it is the submission that in serving a party whose address is outside jurisdiction, the Claimant/Respondent are mandatorily obliged to comply with Section 97 SCPA 2004. See *KIDA v OGUNMOLA* (2006) 13 NWLR (Pt 997) 377.

It is submitted that failure to comply with the mandatory endorsements contemplated by Section 97 SCPA as in this case renders this suit null and void and of no effect in law. See *SKEN CONSULT v UKEY* (1981) 1 SC 6.

It is further submitted that the Honourable Court lacks the territorial jurisdiction to entertain this matter as the Defendant reside in Makurdi, Benue State and the cause of action leading to this suit also happened in Makurdi, Benue State. See *TUKUR v GOVT. OF GONGOLA STATE* (1989) 4 NWLR (Pt 117) 517 at 560 – 561. Court is urged to grant this application.

In opposition to this application, the Claimants/Respondents filed a 16-point counter affidavit dated 19/12/2019.

Learned counsel to the Claimant/Respondent equally filed a written address dated 19/12/2019 wherein counsel adopted the sole issue submitted for determination by the Defendant/Applicant's counsel, to wit:

***“Whether in the circumstances so far, of this case, the Honourable Court has the competence and jurisdiction to entertain this suit”***

On this sole issue, it is the submission of counsel that it is the claim of the Claimant that determines the jurisdiction of a court. See CAPITAL BANCORF LTD v SHELTER SAVING & LOAN LTD & ANOR (2007) 1 SCNJ 236.

It is submitted that an action upon a breach of contract may be commenced and determined in any one of the following three places, namely: (i) where the contract was made; or (ii) where the contract ought to have been performed; or (iii) where the Defendant resides. See KRAUS THOMPSON ORGANISATION LTD v UNIVERSITY OF CALABAR (2004) 4 SCM 83.

That in the instant case, the contract was to be performed in Abuja.

On the issue of endorsement on the writ and the effect thereof. It is the submission that anything after leave is obtained by the Claimant and necessary fees paid becomes the responsibility of the Registry of the court.

It is submitted that what the Defendant/Applicant should complain of is the service of the writ and not the writ itself. That the right application should be setting aside the service and not the writ of summons.

It is the submission that the Defendant having taken steps by entering appearance on the strength of the irregular service

constitutes a waiver of the irregularity. See ODUWA INVESTMENT CO. LTD v TALABI (1997) 10 NWLR (Pt 523); ARIORI & ORS v ELEMOMO & ORS (1983) 1 SC 13; EZOMO v OYAKHIRE (1985) 2 SC 260. Court is urged to hold that the defendant have waived their rights to raise this objection.

As to what amounts to the place of constructing/performance of the contract. It is the submission that parties did not enter into a written agreement as clearly stated in the writ of summons, the transaction was agreed by telephone calls, electronic banking utilized by the Defendants. From paragraphs 12 and 15 of the statement of claim and Exhibit A attached to the counter affidavit, the Defendant by their own admission put the place of performance of the contract to be Abuja. Court is referred to Order 3 Rule 3 of the Rules of this court and urged to hold that the contract under consideration was electronically consummated with performance to be in Abuja and to dismiss this application.

I have carefully considered the processes filed and the submission of learned counsel on both sides, it is clear from the submissions of learned counsel to the Defendants/Applicant that his application is premised on two (2) limb:

1. That the cause of action arose wholly in Makurdi, Benue State.
2. That the provision of Section 97 SCPA as regards endorsements on the writ of summons was not complied with; therefore the court should decline jurisdiction.

With respect to the first limb, it is trite law that it is the claim of the Claimant which confers jurisdiction on the court. See the case of OSUU S.C. ODUKO v GOVT. OF EBONYI STATE OF NIG. & 3 ORS (2009) 3 – 4 SC 154. Looking at paragraph 12 of the Statement of Claim, it is clear that the Claimant did not aver that performance of the contract was in Benue State, but rather performance was to be in Abuja.

It is the law that an action upon a breach of contract may be commenced and determined in any of the following places, namely (i) where the contract was made; or (ii) where the contract ought to have been performed, or (iii) where the Defendant resides. See RIVERS STATE GOVT. OF NIG. & ANOR v SPECIALIST CONSULT (2005) 3 SCM 83.

It is evident from the statement of claim and counter affidavit to this application that the contract was electronically concluded with the very representation by the Defendant to be performed in Abuja.

By virtue of the provision of Order 3 Rule 3 of the Rules of this court, the Claimant can validly institute an action where the contract was to be performed. In the instant case, the contract by the admission of the Defendants by letter dated 6/9/2019 attached to the Claimants/Respondent's counter affidavit as Exhibit A and the averment in the statement of claim suggest that the contract was to be performed in Abuja.

In the light of the above, I hold the firm view that the commencement of this suit in this court is within the confines of the law.

Now on the issue of endorsement on the writ of summons. The provision of Section 97 SCPA is to the effect that a writ of summons to be served outside the jurisdiction of the issuing State must be so endorsed. And were the writ is not so endorsed the service of such writ is liable to be set aside by the court.

In the instant case, it is without doubt that the said writ of summons was served on the Defendant/Applicant without compliance with the provision of Section 97 of SCPA. However, in the case of ODU'A INVESTMENT CO. LTD v TALABI (Supra) the Supreme Court held that a Defendant has a choice either to object to the service by applying to have it set aside and the court *ex debito justitiae* will accede to the application, or ignore the defect and proceeds to take steps in the matter. Where the later is the case, this application to set aside must be refused.

In the instant case, the Defendants/Applicant entered appearance and filed their statement of defence. I am of the view that the Defendants/Applicants filing their statement of defence on the strength of the irregular service constitutes a waiver of the irregularity. See ARIORI & ORS v ELEMOMO & ORS (Supra) at 48 – 49.

In the case of EZOMO v OYAKHIRE (Supra) the court held as follows:

***“Even where the Defendant in his statement of defence indicates that a court has no jurisdiction, and in his motion for dismissal of the action expressly relies on the provision of statute that requires endorsement of a writ of summons for service outside jurisdiction, but his filing a statement of defence is by itself a waiver of his right to ignore the writ of summons.”***

In the light of the above, I hold the considered view that by the act of the Defendant/Applicant filing their statement of defence they have waived their right.

Accordingly this application is lacking in merit, it is hereby dismissed.

**(Sgd)  
JUSTICE SALISU GARBA  
(PRESIDING JUDGE)  
05/03/2020**

Claimant's Counsel – We thank the court for the ruling. We ask for a date for hearing.

Defendant's Counsel – We commend the court for the industry.

Court – Suit adjourned to 22/4/2020 for hearing.

**(Sgd)  
JUSTICE SALISU GARBA  
(PRESIDING JUDGE)  
05/03/2020**