

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

BEFORE HIS LORDSHIP: HON. JUSTICE JUDE O. OKEKE FICMC

ON WEDNESDAY THE 22ND DAY OF JANUARY , 2020

SUIT NO: FCT/HC/CV/065/2018

MOTION NO: FCT/HC/CV/M/4877/2019

BETWEEN:

**VINMARK PROPERTY DEVELOPMENT
COMPANY LIMITED CLAIMANT/RESPONDENT**

AND

**SECRETARY TO THE GOVERNMENT
OF THE FEDERATION DEFENDANT/APPLICANT**

RULING

By a motion on notice filed on 2/4/2019 and predicated on Order 43 Rules 1 and 2 of the Rules of Court 2018 and inherent jurisdiction of the Court.

The Defendant/Applicant (“The Applicant”) seek for the following reliefs:-

- “(1) AN ORDER striking out the name of the Defendant/Applicant for non-disclosure of any cause of action against him in this suit.

- (2) AN ORDER of stay of proceedings in this suit for failure of the Claimant to first resort to arbitration before approaching the Court.
- (3) ANY OTHER ORDER(S) as this Honourable Court may deem fit to make in the circumstance of this suit.”

The application is supported by an 8-paragraph affidavit deposed to by Audu Zakaria and Written Address of the Applicant’s Counsel.

In response, the Claimant/Respondent (“The Respondent”) on 5/4/2019 filed a 22-paragraph Counter affidavit deposed to by David Ibeawuchi along with the Written Address of its Counsel.

At the hearing on 30/10/2019, Counsel for the parties adopted their Written Addresses in support of and against the application. Ruling was then reserved for today 22/1/2020.

In the affidavit in support, it was avered on behalf of the Applicant that there is no cause of action established against the Applicant in this suit. That the Applicant is not indebted to the Respondent in any manner whatsoever.

The Applicant did not authorize any award of contract in favour of the Respondent.

There has never been any correspondence between the Applicant and the Respondent in respect of any award of contract or demand for payment of any contract sum.

The Applicant is not privy to the contract allegedly by executed between the Respondent and the Federal Government of Nigeria. .

There is no agent and principal relationship between the Applicant and office of the Special Adviser to the President on Sustainable Development Goals.

In every contract executed between the Applicant representing the Federal Government of Nigeria and Contractor, there is an arbitration Clause.

The arbitration Clause requires parties in the contract to first resort to arbitration in the event of dispute arising from the contract for possible resolution.

The Respondent did not avail parties the opportunity to first resolve this dispute through arbitration before approaching the Court.

This suit is premature. It is in the interest of justice to strike out the name of the Applicant and/strike out this suit.

In his Written Address, Mr. Emmanuel E. Akissa of Counsel for the Applicant raised two issues for determination by the Court, thus:

- “(1) whether this suit disclosed any cause of action against the 1st Defendant/Applicant (SIC)
- (2) whether parties to a contract containing an arbitration clause can proceed to Court in the event of a dispute without first resorting to arbitration”.

Treating issue no. 1, learned counsel referred to FRED EGBE V. HON. JUSTICE J.A. ADEFARASIN (1978) 1 NWLR (Pt. 47) p. 1 on the meaning of cause of action. He stated that it is the fact or combination of facts which give rise to a right to sue and it consists of two elements:-

- (a) The wrongful act of the Defendant or Respondent
- (b) The consequential damage suffered by the Plaintiff which gives the Applicant cause of complaint. He referred to SAVAGE V. UWECHIA (1972) 1 ALL NLR (Pt. 1251), ADESOKAN V. ADEGBOKOLU (1997) SCNJ P. and OSHOBOH V. AMUDU (1992) 7 SCNJ P. 317.

Learned Counsel submitted that in determining whether or not a Plaintiff's case discloses a cause of action, the writ of summon, pleadings and circumstance of the case must in totality be examined by the Court. He relied on OSIGWE V. PS PLS MANAGEMENT CONSORTIUM LTD (2009) 13 NWLR (Pt. 1128) p. 378.

Learned Counsel submitted that in the instant case, the crux of the Respondent's case as seen in the paragraph of its Statement of Claim centres on the non payment of outstanding contract sum due to the Respondent in a contract allegedly executed between the Respondent and the Senior Special Adviser to the President on sustainable Development Goals. There is nothing linking the Applicant in the alleged transaction. The Applicant does not authorized awards of contracts by the Senior Special Adviser to the President on Sustainable Development Goals (SSAP SDG).

The Respondent has failed to show the Court how the Applicant participated in the alleged award and execution of the contract under reference. The Respondent only stated in paragraphs 4 to 7 of its

Statement of Claim that the SSA – SDGS is directly under the Presidency with its’ letter head paper bearing “OFFICE OF THE PRESIDENCY” and that it was a program launched by the Federal Government of Nigeria through the Applicant and nothing more. All through the process of the bid, award, execution and payment of the contract sum, there is no mention of any correspondence between the Respondent or the SSAP – SDGS and the Applicant.

The Respondent never considered the Applicant as one against whom it has any claim hence the demand letters and pre-action notice were not copied to it.

Dwelling further, Learned Counsel submitted that the Applicant is not privy to the contract allegedly executed between the Respondent and the SSAP-SDGS. Only parties to a contract might sue or be bound by the contract. It would be unfair to prevail the Applicant to shoulder responsibility on as arrangement allegedly reached by the Respondent and the SAP –SDGS which it is wholly unaware. He referred to UNION BANK LTD & ANOR V. MRS. EDET (1993) 4 NWLR (Pt. 287) p. 288 to underscore the contention that a contract cannot be enforced by a person who is not party to it even if it is made for his benefit and purports to give him right to sue upon it.

Counsel urged the Court that from the circumstances of this suit and reliefs sought by the Respondent no cause of action has been disclosed against the Applicant.

Arguing issue no. 2, Learned Counsel submitted that it is trite that where parties enter into agreement and there is an arbitration clause whereby

parties must first resort to arbitration before trial in Court, it is natural for the Defendant where the other party has filed a suit to ask for a stay of proceeding pending the arbitration. He referred to *FAWEHINM CONSTRUCTION CO-LTD V. OAU* (1999) 6 NWLR (Pt. 55) 3 p. 171. The effect of arbitration Clause is not to oust the jurisdiction of the Court to adjudicate but a condition precedent which must be fulfilled.

He called in aid *SCOA (NIG) PLC V. STERLING BANK PLC* (2016) LPELR – 40566.

He contended that in order to protect the Federal Government of Nigeria from unnecessary litigation arising from matters that can be amicably resolved, the Applicant has made it compulsory for an arbitration Clause to form part of every contract authorized by it. Assuming but without conceding that there is any contract agreement between the Respondent and any person whatsoever authorized by the Applicant, it should contain an arbitration clause. The Respondent has however not pleaded any contract agreement in its pleadings and the Applicant is not aware of any.

Concluding, counsel contended that no cause of action was disclosed against the Applicant in the Respondent's writ and Statement of Claim. Where however the Court finds there is a contract between the Respondent and the Applicant, the Court is urged to make an order striking out the name of the Applicant and/or Order for stay of proceedings pending arbitration.

In its Counter Affidavit, it was averred on behalf of the Respondent that the averments in paragraph 4(B) of the Applicant's affidavit is false. That

the Sustainable Development Goal who represented the Federal Republic of Nigeria in the said Contract is a program of the Federal Government and the President appointed a Senior Special Assistant to the President on Sustainable Development Goals (SSAP) on SDG whose office is responsible for implementation of developmental policies, plan and strategies set out to run for the development of the various geopolitical Zones. Consequent upon this, a suit against the Federal Government can be brought against its principal Officer – Secretary to the Government of the Federation.

That the averments in paragraph 4(C, D) of the affidavit in support are false. That the Chief Clerical Officer of Sustainable Development Goal Malill Na'ason deposed to an affidavit where he stated that Sustainable Development Goal represented the Federal Republic of Nigeria and as such the Applicant being the principal officer of the Federal Government cannot escape liability arising from such representation.

Contrary to the Applicant's averment in paragraph 4(E,F,G) of the affidavit in support, the Applicant is charged with the responsibilities of effectively coordinating the activities of ministries and Government agencies on implementation of Government decisions, policies and programs.

Contrary to paragraphs 4(H) of the affidavit in support, the Applicant through Andrew Warri of its Legal unit admitted on oath in paragraph 4(C) of an affidavit dated 14/9/2018 that they requested for briefing from the office of the Special Assistant to the President on Sustainable Development Goal to enable them file notice of intention to defend an

act that establishes a nexus between the Applicant and Sustainable Development Goal in this suit.

The said affidavit and correspondence letter are attached as Exhibits V2 to V4.

Parties have joined issues as well as exchanged pleadings and there is no such document before the Court to buttress the assertion by the Applicant.

Contrary to paragraph 4(K) of the Applicant's affidavit there was a contract wherein the Applicant was represented by Sustainable Development Goal which was awarded to and executed by the Respondent.

It will be in the interest of justice to refuse the Applicant's application.

In his Written Address, Ikenna Okeke Esq of counsel for the Respondent raised a sole issue thus:

"Whether this Honourable Court can grant the reliefs sought in the Defendant/Applicant's application".

He submitted that an agent of a disclosed principal is not ordinarily personally liable in a contract he enters on behalf of the principal. He referred to LEVENTIS V. PETROJESIKA (SIC) 4SCNJ P. 129.

He referred to PAUL AMIOLEMHAN & ORS V. NIGERIAN GAS COMPANY & ANOR (2012) LPELR-7957 to contend that the Court of

Appeal held in NIGERIAN REINSURANCE CORPORATION V. CUDJOE (2008) 10 NWLR (Pt. 1095) p. 325 that in determining whether an organization is a Federal Government Agency, the following two factors should be considered.

- (I) Whether Federal Government has control over it.
- (II) Whether the function of such organization are aimed at affecting the policies of the Federal Government.

Counsel submitted that flowing from the above, that the sustainable development goal is a program of the Federal Government and going further the president through the principal Officer (Secretary to the Federal Government) set up this program known as Sustainable Development Goals in Nigeria which emanated from the United Nations and further appointed Senior Special Assistant to the President on Sustainable Development to run the program.

That the said program has carried out several governments developmental policies which have been ratified by the Federal Government through Presidential Monitoring Committees as sustainable development goals.

Counsel referred to page 68 of the Black's Law Dictionary on the definition of agency and relying on OSIGWE V. PSPLS MANAGEMENT CONSORTING LTD & ORS (2009) 3NWLR page 378 contends that an agency in law exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. That in holding the principal bound by an act of agent, it must be established that such an act was legally authorized

from express instruction given or implied from the words or conduct of the principal.

Counsel contended that the Applicant is not entitled to the reliefs sought as this can be confirmed by the exchange of correspondence and briefing between the Applicant and Office of Special Assistance to the President on Sustainable Development Goal who negotiated and awarded contracts on behalf of the Applicant the Applicant's application can only be seen as a way of avoiding liability emanating from the conduct of its agent. He relied on NIGER PROGRESS LTD V. NORTH EAST LINE CORPORATION (1989) 3 NWLR (Pt. 107) p 68.

Learned Counsel further submitted that if an agent enters into a contract with another person in his capacity as an agent of his principal, the principal though not a party to the contract can sue to enforce such Contract entered by his agent. So also a party to the Contract can sue the disclosed principal to enforce the performance of any delegation thereunder.

That at all times material to the suit, the office of the Senior Special Assistant to the President on Sustainable Development Goal acted as an agent of the Applicant which was further confirmed by the position maintained in the deposition of one Mailil Na'asm the Chief Clerical Officer in the Office of the Senior Special Assistant to the President on Sustainable Development Goal.

Counsel next opined that what is admitted needs no further proof and urged the Court to dismiss the application.

On the issue of when a party to an arbitration clause can ask for stay of proceedings and conditions precedent for the exercise of Court's discretion to grant such an order, Counsel referred to the provision of Section 5 of the Arbitration and Conciliation Act and contended that the Applicant having entered appearance, joined issues and exchanged pleadings in this case, has waived its right under the arbitration clause and as such submitted to the jurisdiction of the Court.

Counsel also relied on UBA V TRIDENT CONSULTING LIMITED (citation not supplied) as having established the condition precedent for Court to exercise its discretion which is to the effect that for an application for stay of proceedings pending arbitration to succeed, the Applicant must adduce documentary evidence showing the steps he has taken in respect of commencement of arbitration. That in this case the Applicant deposition that there is an Arbitration Clause is not enough. There must be documentary evidence showing the Applicant wrote the Respondent notifying it of the willingness to resort to arbitration over the dispute and also specifying in the letter an arbitrator or arbitrators to be appointed for the arbitration for ratification or approval of the Respondent.

Concluding, learned Counsel contended that the Applicant withheld copies of the agreement to the Contract. That it has a duty to place them before the Court as documentary evidence of the agreement alongside this application for the proceeding to enable the Court ascertain the purported Arbitration Clause and make proper pronouncement where necessary.

He urged the Court to dismiss the instant application.

I have carefully weighed the averments in the affidavits of the parties and submissions of their learned Counsel. The cardinal issue that calls for determination is whether or not the Applicant has made out a case to justify a grant of the reliefs sought.

The instant application is one in which the Applicant effectively seeks for an Order of Court striking out the Respondent's suit on the ground of non disclosure of any cause of action against it. In what appears like an alternative prayer, it seeks for an Order of Court staying proceedings in the suit for failure of the Respondent to first take resort to arbitration before instituting the suit.

I am minded to start with a consideration of the second prayer. It is the Applicant's contention that the Respondent ought to have first taken a resort to arbitration before initiating the suit. That the Applicant has an established practice in which it incorporates in its Contracts arbitration clause which guides resolution of dispute in any contract it entered into with any party.

The learned Respondent's Counsel in his submission contended that for the Applicant to succeed in such a contention, it has the duty to first place the Contract containing the arbitration clause before the Court first to examine and take necessary decision. That no such contract was placed before the Court in this case and therefore the contention is unavailing to the Applicant.

I do agree with the learned Respondent's Counsel that the Court cannot validly hold that there is an arbitration clause between the parties and

consequent upon that make an order staying proceedings for non compliance with it when, by the records of Court, the Applicant did not place any Contract containing any such arbitration clause between it and the Respondent before the Court. The settled position of the law is that he who asserts bears the evidential burden to lead evidence in proof of that which he asserts. See: Section 131 to 133 of the Evidence Act 2011.

The Applicant in this application having not placed before the Court any evidence of arbitration clause between it and the Respondent, the Court cannot rely on alleged existing practice hold that there is one between the parties and found the Respondent liable of non compliance with it. In the light of this, there is no basis upon which the Court can hold that the Respondent did not comply with an arbitration clause in a contract with the Respondent before initiating this suit. In the circumstances, this leg of the Applicant's objection cannot be sustained. It fails and is dismissed.

This leaves the Court with the issue of whether or not the Respondent's suit discloses a cause of action. In *DANTATA V MOHAMMED* (2000) 7 NWLR (PT. 664) P. 178, The Supreme Court took time to explain what is meant by cause of action, and the factors to consider in determining whether or not a suit discloses it.

The apex Court in the case defined "cause of action" in these words: -

"The phrase "cause of action" means simply a factual situation the existence of which entitles one person to obtain a remedy against another person. It is a fact or combination of facts which when proved would entitle a Plaintiff to a remedy against a Defendant. It

consists of every fact which would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the Court. That is, the fact or combination of facts which gave rise to a right to sue. It is a cause for an action in the Courts to determine a disputed matter”.

At page 209, it went further to explain, that the phrase cause of action comprises the averment or averments in the Plaintiff’s Statement of Claim that discloses an action for a wrongful act alleged.

With respect to how to determine whether a suit discloses a reasonable cause of action, the Court held thus: -

“In order to determine whether the Statement of Claim has disclosed a reasonable cause of action, what the Court should consider are the contents of the Statement of Claim and not the extent to which one relief co-exist with another. Having considered the contents of the Statement of Claim, deemed to have been admitted, the question is whether the cause of action has some chance of success notwithstanding that it may be weak or not likely to succeed. Thus it is irrelevant to consider the weakness of the Plaintiff’s claim. What is important is to examine the averments in the Statement of Claim and see if they disclose some cause of action or raise some questions fit to be decided by the Court”.

From the foregoing guides laid by the apex Court, it is apparent that in determining whether or not a Claimant’s suit discloses a cause of action that the process the Court is under a duty to examine are the contents or averments in the Claimant’s Statement of Claim only and no other. The said averments, for the purpose of determination of the application are

deemed admitted by the Defendant. It is the duty of Court to scrutinize the said averments to ascertain whether or not they contain an issue fit for the Court to adjudicate upon. Where there is one, the suit is said to disclose reasonable cause of action irrespective of how weak or strong the Claimant's case may be.

In this case, a reading of the Respondent's Statement of Claim shows that it is one in which the Respondent averred inter alia, that the Applicant is Secretary to the Government of the Federation. That it was awarded a Contract by the office of the Special Assistant to the President on Sustainable Development Goal. The office of the Special Assistant to the President on Sustainable Development Goal is an office reporting and taking directives from the Presidency and therefore represented the Federal Government of Nigeria in the Contract award. The Federal Government of Nigeria carries on programs and projects through the Secretary to the Government of the Federation. The Sustainable Development Goal is a program of the Federal Government launched through the Secretary to the Government of the Federation with the aim to develop various geopolitical zones in Nigeria.

The Defendant being the principal officer of the Presidency ratifies the actions and activities of Sustainable Development Goal. The offer of the Contract award was for construction of 11 nos of Solar Street Lights at Abia North Senatorial District of Abia State in the sum of N6, 600, 000.00. The Claimant completed the contract in 2014 and the Defendant through its agent paid it the sum of N1, 897, 569.98 out of the contract sum.

The Defendant through its agent (the office of the Senior Special Assistant to President on Sustainable Development Goal) wrote to the Claimant's bank requesting for domiciliation of payments in respect of the Contract. The Defendant through her agent stated that it has approved that all payments due to the Claimant will be paid into account no: 2017698650. The Defendant in response to the Claimant's Counsel's letter to it dated 21st July 2017 admitted that the Claimant has duly completed the project as well as the outstanding debt due to it.

The Defendant and her agents have inordinately refused and failed to honour their contractual obligation to the Claimant. The Claimant claims against the Defendant in the terms of the Statement of Claim.

From the foregoing averments in the Respondent's Statement of Claim which are deemed admitted by the Applicant for the purpose of determination of this application, can it be said that the averments do not disclose any complaint for adjudication between the parties by the Court? It is the view of the Court that the averments amply disclose complaints worthy of adjudication between the parties. The complaint simply put is that the office of the Special Assistant to the President on Sustainable Development Goal whose actions and activities are ratified by the Defendant awarded contract for construction of eleven solar street light in Abia State to the Respondent in the sum of N6, 600, 000.00 and after executing the contract in 2014, the Applicant through its agent paid it only N1, 897, 569.98 out of Contract sum of N6, 600, 000.00 and the Applicant had despite its admission of that the Respondent executed the Contract and the outstanding debt in its letter dated 4th December 2017 has till date not paid the balance of the Contract sum. For these reasons the Respondent instituted the instant action for redress.

It is the respectful view of the Court that the Applicant given its role as an entity which ratifies the actions and activities of the office of the Special Assistant Office of the president on Sustainable Development Goal which awarded the said Contract to the Respondent and its admission through its agent in the letter dated 4th December 2017 that the Respondent duly executed the Contract and is in debt of the said sum due and payable to the Respondent having not been paid to it gives it right to proceed against the Applicant and its agents to recover the outstanding balance of the Contract sum. This is a matter which is worthy of adjudication by the Court between the Respondent and the Applicant.

As directed by the Supreme Court in the DANTATA case supra, it is not part of the duties of this Court at this stage to go into a determination of how weak or strong the Respondent's case is. What is important is that there is an issue for determination by the Court between the parties.

By reasons of the foregoing, the Court holds that the Respondent's suit discloses a cause of action against the Applicant. The first leg of the objection is therefore resolved against the Applicant in favour of the Respondent. In consequence this objection cannot be granted. It fails and is hereby dismissed with cost assessed and fixed at N50, 000.00 in favour of the Respondent against the Applicant.

Signed
Hon. Judge
22/1/2020

LEGAL REPRESENTATIONS:

- (1). Emmanuel E. Akissa Esq for the Defendant/Applicant.
- (2). Ikenna Okeke Esq for the Claimant/Respondent.