

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 11

SUIT NO: FCT/HC/M/5864/19

BETWEEN:

GIT ENGINEERING LTD.....CLAIMANT/RESPONDENT

VS

TRANSMISSION COMPANY OF NIGERIA....DEFENDANT/APPLICANT

RULING

By a Notice of Preliminary Objection dated 2/5/19 but filed on 7/5/19, the Applicant challenges the competence of this Suit before this court. The grounds of objection are:-

- (1) That the court lacks jurisdiction to hear the said matter,
- (2) That Judgment has already been entered on the said subject matter of the Suit.
- (3) That the matter is Res Judicata therefore cannot be adjudicated upon by same parties.
- (4) That the only available remedy for the Claimant is enforcement of the judgment entered by a court of competent jurisdiction.

- (5) That no pre-action notice was served on the Defendant before instituting the Suit.

Accompanying the Preliminary Objection is an affidavit of Eleven (11) Paragraph deposed to by H.M. Ibrahim with two (2) Exhibits annexed and marked as "Exhibit "A1" and "A2". Also filed a Written Address and adopts the said Address in urging the court to grant the application and dismiss the Suit in its entirety.

In opposition, the Respondent filed a Written Address on 10/5/19 and urged court to dismiss the Preliminary Objection with substantial cost.

In the Written Address of Applicant, I.H. Halaraba of Counsel submitted two (2) issues for determination;

- (1) Whether the subject matter of Suit No. FCT/HC/CV/485/2016 where judgment is entered as Consent Judgment is not the same as the subject matter in Suit No: FCT/HC/CV/119/2018 presently pending before this court.
- (2) Whether this court has jurisdiction to hear Suit No. FCT/HC/CV/118/2018 presently pending before it haven been determined by court of competent jurisdiction.

And submit, on issue 1, that subject matter of Suit No. FCT/HC/CV/485/16 is same as Suit No. FCT/HC/CV/118/18 which has been decided by court of competent jurisdiction and judgment entered as consent judgment thus making suit No. FCT/HC /CV/118/18 Res judicata and cannot be brought back to court on litigation. Commend the court to Tony-Anthony Holidays Ltd Vs C.B.A.

(2013) ALL FWLR PT 698 AT 065 – 966. That a careful perusal of claims of Claimant/Respondent in Suit No. FCT/HC/CV/485/16 as shown on its Exhibit "A1" and that in the substantial Suit shows clearly issues that were really involved in Exhibit "A1" are same claimed by Respondent before this court and is Res judicata. That Respondent shouldn't have come to court seeking the reliefs as contained in the Statement of Claim but should have sought reliefs based on Terms of Settlement or Agreement and commend the court to Falarin Vs Idowu (2014) ALL FWLR PT 727 784 Para 6.

On issue 2, submits this court lacks the jurisdiction to hear and determine Suit No. FCT/HC/CV/118/18 as same is Res-judicata haven been determined by court of competent jurisdiction. On jurisdiction and where court will determine whether or not it has jurisdiction, refer the court to Edo State Vs Aguele (2018) 3 NWLR PT 3 at 399 and Essi Vs Nigeria Ports Plc (2018) 2 NWLR PT. 1604 at 390 and submit that Respondent's claim in Suit No FCT/HC/CV/485/16 and its claims in the substantive Suit shows its Suit is on same subject matter which has been litigated upon and judgment entered and made it Res judicata and thereby rob this court of jurisdiction to hear and determine the Suit. That the only ground which would have given good footing to Respondentin seeking to set aside judgment entered by consent is when he is able to state that it is vitiated by fraud, mistake or misconception which is not the case in its claim before court, refer to First Motors Ltd Vs Alpha Properties Int'l Ltd (2013) ALL FWLR PT. 655 at 349. Submits Suit No. FCT/HC/CV/118/18 is dead on arrival having been determined by court of competent jurisdiction.Urge court to dismiss the Suit with substantial cost.

In the Written Address of Respondent, J.C. Njikonye, (SAN) of counsel submitted two (2) issues for determination namely;

- (1) Whether the affidavit of H.M. Ibrahim in support of the Notice of Preliminary Objection ought to be struck out for lacking probative value and being legally inadmissible hearsay evidence.
- (2) Whether the instant Suit by the Claimant is caught by the principle of Res judicata thereby robbing the court of the jurisdiction to entertain and determine same.

On issue 1, submits the affidavit of H.M. Ibrahim in support of the Preliminary Objection to be struck out for lacking probative value and being legally inadmissible hearsay evidence. That the affidavit was deposed to by H.M. Ibrahim, Legal Practitioner in the firm of counsel for Applicant and it lacks probative values as counsel lacks the locus to donate facts as counsel qua advocate in the same matter the firm handles. Further, to the extent averred in Para 3 of the affidavit, that the information deposed to by H.M. Ibrahim were supplied to him by I.H. Nalaraba, counsel handling the matter and is nothing more than inadmissible hearsay. Submit for affidavit evidence to be admissible or probative in value must as much as possible confirm to oral evidence in court and for oral evidence to attract probative value, must be direct. In the same vein, for affidavit evidence to attract probative value, must be given by person who could give oral evidence and could be subjected to cross-examination on the facts deposed. Refer court to several judicial authorities; Boniface Ayika Vs Uzor (2006) 41 WRN 175 at 194, CPC Vs Lado (2011) 14 NWLR PT 1266 40 at 74, Lawal Osula Vs UBA Plc (2003) 5 NWLR PT 813, 378 at 388, NPA Vs

Ibrahim & Co (2010) 3 NWLR PT. 1182 5000 – 501, Orunola Vsd Adeoye (1995) 6 NWLR PT. 401 338 at 353, Ibe Vs Onuorah (NO. 2) (2001) 9 NWLR PT. 719 519 at 527, Garan Vs Olomu (2013) NWLR PT 1365 227 at 253.

On issue 2, submit Applicant has not establish that the claim or issue in Suit No; FCT/HC/CV/485/16 are same with the instant Suit. It has also not established that parties are same. That to determine whether the subject matter, claims and issues in both cases are same, it is necessary to make a comparison of both cases. That a careful examination of the claim and reliefs in the two suits shows they are not same. That while the earlier suit arose from termination of contract, the present suit seeks enforcement of contractual rights that arose from Terms of Settlement. That the instant suit is clearly founded upon breach of contract as embodied in the Terms of Settlement parties and terms of settlement must therefore regulate the relationship and entitlement of parties in respect of the subject matter. That if the terms of settlement are breached or not complied with, the injured party must seek his remedy based solely on the agreement, referred the court to Wolucham Vs Wokama (1974) 3 SC, 153, Folarin Vs Idowu (2014) FWLR PT. 727, 784. That a cursory reading and analysis of Para 3 – 16, in particular Para 11 and 13 of Respondent's Statement of Claim in the instant Suit shows cause of action arose from failure of Applicant to honour its obligation in accordance with clause 9 of the Terms of Settlement/Consent Judgment in Suit No. FCT/HC/CV/485/16 after Respondent's full satisfaction of its obligation on the Terms of Settlement.

I have given insightful consideration to the affidavit evidence of Applicant, the submission of both counsel, the judicial authorities cited as well as the annexed

Exhibit "A1" and "A2" of Applicant and find that only one (1) issue calls for determination in this application and that is;

"Whether this instant Suit of Claimant/Respondent is caught up by the principle of Res judicata and therefore divests the court of jurisdiction to hear and determine the Suit"

The contention of Applicant, in the main, is that; the subject matter of Suit No: FCT/HC/CV/485/16 earlier instituted by Respondent as shown by its Exhibit "A1" which has been decided by court of competent jurisdiction and judgment entered as Consent Judgment as evidenced by the Exhibit "A2", is same as the instant Suit No. FCT/HC/CV/118/18 filed by Respondent thereby making Suit No: FCT/HC/CV/118/18 Res judicata and robs court of jurisdiction to hear and determine same. Respondent, on the other hand contend that the Applicant has not shown that the claims or issues in Suit No: FCT/HC/CV/485/16 are same with the instant Suit neither has it prove that the parties are same.

The principle of Res Judicata means that the subject matter now being disputed had been a subject matter of an earlier litigation in which the parties were same and final judgment entered. Therefore to sustain a plea of Res Judicata, the party rely on it must satisfy the following conditions;

- (1) That the parties or their privies are the same in the previous Suit as in the present Suit;
- (2) That the claim and issue are the same in the previous Suit as in the present Suit;

- (3) That the subject matter of litigation is the same in the present Suit as in the previous Suit;
- (4) That the adjudication in the previous case must have been given by a court of competent jurisdiction;
- (5) That the previous decisions must have finally decided the issue between the parties.

See the case of Abe Vs Adeniyi (2007) 4 NWLR PT 1023 191 at 194 – 195. See Iso Margi Vs Yusuf (2009) 17 NWLR PT. 1169 162 at 167 – 168. The above are pre-conditions which must be established for the principle of Res Judicata to be operational. See Margi Vs Yusuf (Supra) at 168. The question here is; whether the Applicant has established the above pre-condition to rely on the plea of Res Judicata or put in another form; whether the principle of Res Judicata is applicable to the case of Respondent from the facts before court and in view of the pre-condition a party must fulfill in order to successfully rely on the principle. My Answer to the poser is No. A critical perusal of the Exhibit "A1" and "A2" of Applicant shows that, though this instant Suit No: FCT/HC/CV/118/18 of the Respondent emanated from same subject matter with Suit No: FCT/HC/CV/485/16 which Consent Judgment has already been entered in line with Terms of Agreement of the parties as shown by the Exhibit "A2", the claims or reliefs in Suit No: FCT/HC/CV/485/16 is not the same as in this instant Suit No: FCT/HC/CV/118/18. Different Suits and cause of action may emanate from same subject matter. See the case of C.O.M. Inc Vs Cobham (2006) NWLR PT. 1002, 283. Also the parties in Suit No: FCT/HC/CV/485/16 and Suit No: FCT/HC/CV/118/18 are not the same. As

stated earlier, for a party to rely on plea of Res Judicata, must satisfy all pre-conditions as stated above. See Abe Vs Adeniyi (Supra) at 194 – 195.

The Applicant, therefore, failed to establish all pre-condition for the invocation of principle of Res Judicata. It does not, therefore, avail the Applicant.

This instant Suit No: FCT/HC/CV/118/18 is anchored on alleged breach or non-compliance of Applicant with Clause 9 of Terms of Settlement/Consent Judgment of court, the Exhibit "A2", in an earlier Suit No: FCT/HC/CV/485/16 of Respondent after she claimed to have fulfilled its own part of the terms. In other words, in a bid to enforce the right that accrued to it under the said Clause 9 of Terms of Settlement/Consent Judgment, the Respondent filed this instant Suit No: FCT/HC/CV/118/18 which, in the view of court, is separate and entirely different Suit from the earlier Suit NO: FCT/HC/CV/485/16 of Respondent. The common feature of the earlier Suit No: FCT/HC/CV/485/16 and this instant Suit No: FCT/HC/CV/118/18 is that both Suits emanated from same subject matter. And as earlier stated, different Suits and cause of action may emanates from same subject matter. See C.O.M. Inc Vs Cogham (Supra).

On the issue raised by Applicant, that Pre-action Notice was not served on them before instituting the action. Pre-action Notice do not impede right of access to court. They are meant to give room for the Government or its officials to consider settlement of a matter. They do not remove or affect the adjudicatory power of the court. See the case of NNPC Vs Tijani (2006) 17 NWLR PT. 1007 29 at 34. In any event, Pre-action Notice implies some form of Legal Notification or information required by law in a statute which requires compliance by person under legal duty to put on notice the person to be

notified before the commencement of any legal action against such a person. See the case of *Ntiero Vs NPA* (2008) 10 NWLR PT. 1004 129 (SC). What this implies is that if a party to a Suit raises issue of Pre-Action Notice, the onus is on him to establish under what law or statute he raises it. It is not enough for such a party to raise the issue without more, as Applicant has done, in the instant case, she merely raise the issue that no Pre-Action Notice was served on Applicant before instituting the Suit without stating under what law or statute she raised the issue. It does not, therefore, avail the Applicant.

On the issue raised by Respondent, that the affidavit in support of the Preliminary Objection of Applicant ought to be struck out for lacking in probative value and legally inadmissible evidence because the facts deposed to were donated to him by another counsel handling the matter. I am not in agreement with the submission of Learned Counsel for Respondent on the point. Under the Evidence Act, a deponent can in an affidavit depose to information derive from another source other than his own personal knowledge provided he discloses his source of information. See the case of *Veepee Ind Ltd Vs Cocoa Ind. Ltd* (2008) 13 NWLR PT.1105, 486 (SC). This Applicant has done. And the fact that the affidavit was deposed to by counsel, does not, in view of court, affect the competency of the affidavit as canvassed by counsel. Overtime the court has stated that counsel qua counsel must refrain from deposing to affidavit on contentions matters of facts on behalf of clients. See *Becay Int'l (Nig) Ltd Vs Fidelity Bank Plc* (2018) ALL FWLR PT 948 1356 at 1364 –1365. Counsel are only urged to refrain from such practice and does not in any way affect the competency of such affidavits.

From all of these, it is the findings of court that the Preliminary Objection of the Applicant fails. It is hereby dismissed.

I made no orders as to cost.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

11/3/2020.

I.H. NALARABA – FOR THE DEFENDANT/APPLICANT

J.C. NJIKONYE (SAN) WITH ISAAC ITA, I.A. NNANA – FOR THE CLAIMANT/RESPONDENT