IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 13

COURT CLERKS: T. P. SALLAH & ORS

DATE: 17/02/2020

FCT/HC/M/904/19

FCT/HC/CV/220/2018

BETWEEN:-

UNITS ENVIRONMENTAL SCIENCES LIMITED … PLAINTIFF/ RESPONDENT

AND

1. THE HONOURABLE MINISTER FEDERAL CAPITAL TERRITORY
2. FEDERAL CAPITAL TERRITORY DEVELOPMENT AUTHORITY

DEFENDANTS/ APPLICANTS

RULING

The Plaintifforiginally commenced this action against the Defendants under the undefended list procedure of this Honourable Court. The suit was however removed from the undefended list and placed on the general cause list by the order of this HonourableCourt. Pleadings were ordered and record shows that all parties complied by filing their respective pleadings.

The Defendants have now filed the present Motion on Notice No. M/904/19 dated and filed on 12th November,2019 pursuant to the provisions of Order 43 Rules 1, 2 and 3 as well as Order 19 Rules 1(1) and (2) of the Rules of this

Courtpraying this Honourable Court for the grant of the following:-

1. An order of this Honourable Court giving effect to clause No. '8' of the Development Lease Agreement signed by the Parties in the suit herein dated November 2005.
2. An order of stay of proceedings of this Honourable Court pending the conduct and/or outcome of arbitration proceedings pursuant to the parties agreement dated November 2005.

   Alternatively

   An order referring the suit herein to the Abuja Multi-Door Court in line with the extant rules of this Court and/or Clause No.'8' of the Development Lease Agreement signed by the parties in November 2005.
3. An order of the Court stipulating the time within which parties are to commence and conclude the said arbitration proceedings and to report settlement to this Honourable Court.
4. And for such further or other order(s) as this Honourable Court may deem fit to make in the circumstances.

In support of the application, the Defendants/Applicants filed an affidavit of 7 paragraphs with oneexhibit marked exhibit A as well as their Counsel's Written Address.

Opposing the application, the Plaintiff/Respondent filed its Counsel's Reply on Points of Law.

Counsel to the Defendants/Applicants formulated an issue for determination of the application to wit:-

> *"Whether having regard to the affidavit depositions herein and the grounds therein, this Court should not grant the prayers of the Defendant/Applicant"*

Succinctly put, the Defendants/Applicants averments in their affidavit in support of the instant application is that the Plaintiff/Respondent's claim in this suit stems from a development lease agreement executed between the

Plaintiff/Respondent and the Defendants/Applicants in November, 2005. A copy of the said lease agreement is attached as Exhibit A. That parties agreed under clause 8 of the said agreement (Exhibit A) that disputes, questions or differences regarding the said agreement shall be referred to arbitration in accordance with the Arbitration and Conciliation Act. That the Plaintiff/Respondent however did not make any recourse to any alternative dispute resolution mechanism before approaching this Honourable Court.

Counsel to the Defendants/Applicants submitted in his address that the grant of an application such as the instant one has been encouraged by the Court of Appeal in the case of ***SINO-AFRIC AGRICULTURE & ORS V. MINISTRY OF FINANCE INCORPORATION & ANOR (2013) LPELR-22370(CA***) and a plethora of other cases which he cited. He thus urged this Court to allow this application in the interest of justice. He further submitted that this Court has power to refer this matter to arbitration in line with clause 8 of the agreement between parties. Counsel contended that the use of the word 'shall' in the clause means that arbitration must be resorted to settle disputes and there is no discretion as to that.

Arguing *par contra*, Counsel to the Plaintiff/Respondent conceded that the Development Lease Agreement (Exhibit A) between parties contains an arbitration clause at paragraph 8 thereof. He further conceded that Section 5 of the Arbitration and Conciliation Act, Cap. A12 LFN, 2014 empowers the Court to stay proceedings/refer matters upon application to give effect to an arbitration agreement. He cited the case of ***KANO STATE URBAN DEV. BOARD V. FANZ CONSTRUCTION CO. LTD (1990) 4 NWLR (PT. 142) P.*** **1** and a host of other cases. Counsel however submitted that it is too late for the Defendants/Applicants to invoke the arbitration clause in Exhibit A as they had not only taken steps in this suit but had filed their statement of defence which they amended. He contended that the law is that an application of this nature

can only be brought before the applicant has delivered any pleading or taken any step in the proceedings. He relied on a number of cases including ***KANO STATE URBAN DEV. BOARD V. FANZ CONSTRUCTION CO. LTD*** which he had earlier cited. Counsel posited that, to make matters worse, the Defendants/Applicants have not satisfied the Court of their readiness to arbitrate. He submitted that Order 19 of the Rules of this Court is inapplicable to the instant case as the Court's power to order reference to the AMDCH only arises when the parties consent. He further submitted that Order 19 does not envisage a situation where the case has gone beyond pre-trial stage nor does it apply to this situation in this case where there is the existence of an arbitration agreement between parties. He posited that it is the provisions of the Arbitration and Conciliation Act that must apply. He finally urged this Court to dismiss the instant application and proceed to the hearing of this case.

Now resolve the sole issue for determination as distilled by the Defendant's Counsel, I must state right from the onset that there appears to be nodispute amongst parties to this case that the Plaintiff/Respondent's claim against the Defendants/Applicants in the substantive suit is predicated on a contractual relationship allegedly entered into between parties vide a Development Lease Agreement (Exhibit A). I have looked at the Plaintiff/Respondent's Amended Statement of Claim and have found this to be so. The Plaintiff/Respondent copiously pleaded the said Development Lease Agreement (Exhibit A) in its Amended Statement of Claim.

It is not also in dispute that Exhibit A contains an arbitration agreement at paragraph 8 thereof. For avoidance of doubt, paragraph 8 of Exhibit A between parties reads as follows:-

> *"8. Every dispute question or difference arising between the parties with regard to this agreement or the duties powers or liabilities of the parties hereunder or with regards to the construction of*

any clause hereof or arising out of or touching anything herein contained whether during the continuance of this agreement or upon or after its termination by act of either party hereto or otherwise shall be referred to arbitration and the provisions of the Arbitration & Conciliation Act, Cap. A1 Vol. I Laws of Federation 2004 or any statutory modification or re-enactment of the same for the time being in force shall apply to such arbitration. Each party shall nominate one arbitrator and the two arbitrators shall appoint a third arbitrator as the presiding Arbitrator. In the case of disagreement the Chief Judge of the Federal Capital Territory Abuja shall appoint the presiding Arbitrator. The place of arbitration shall be Abuja."

It is thus clear that parties, by paragraph 8 of Exhibit A, agreed to submit disputes arising from Exhibit A to arbitration.

In **O*.S.H.C. V. OGUNSOLA (2000) 14 NWLR (PT. 687) P. 431 at P. 444 paragraphs A-B*** the Court of Appeal per Adamu JCA, held thus:-

"It is also a settled principle of law that where, as in the present case, an agreement made and signed by the parties stipulates that any dispute arising therefrom must first be referred to a referee (i.e. an arbitration), it would amount to "jumping the queue" or "putting the cart before the horse" for any of the parties to resolve to go to the Court first before the dispute between the parties is referred to arbitration (or to a referee) as provided in the agreement to which the parties are mutually bound."

However, on the effect of an arbitration clause in a contract it was held in **L*.A.C. V. A.A.N. LTD. (2006) 2 NWLR (PT. 963) P. 49 at P. 73 paragraphs D-E*** thus:-

"A party to an agreement with an arbitration clause has the option to either submit to arbitration or to have the dispute decided by the Court. The choice of arbitration does not bar resort to the Court to obtain security for any eventual award."

See also ***CONFIDENCE INS. LTD. V. TRUSTEES OF O.S.C.E. (1999) 2 NWLR (PT.591) P. 373 at P. 386 paragraphs E-G***.

From the foregoing provisions and authorities, it is clear that a party to a contract (subject to an arbitration clause) may either submit to arbitration under the arbitration clause or approach the Courts of law for the resolution of any dispute under the contract. This right to either submit to arbitration or approach the Courts of law is, however, without prejudice to the other party's right to insist on arbitration if the first party elects to pursue litigation in Court. If litigation is chosen by one party the other party may, nevertheless, insist on arbitration. There is however a procedure for insisting on arbitration. It is provided for under the **Arbitration and Conciliation Act**.

Section 4 of the Arbitration and Conciliation Act provide as follows:-

"Arbitration Agreement and Substantive Claim before Court:

(1) *A Court before which an action which is the subject of an arbitration agreement is brought shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order or stay of proceedings and refer the parties to arbitration.*

(2) *Where an action referred to in subsection (1) of this section has been brought before a Court, arbitral proceedings may nevertheless be commenced or*

continued, and an award may be made by the arbitral tribunal while the matter is pending before the Court."

Section 5 provides thus:-

Power to Stay Proceedings:

(1) *If any party to an arbitration agreement commences any action in any Court with respect to any matter which is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings.*

(2) A Court to which an application is made under subsection (1) of this section may, if it is satisfied –

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and

(b) that the applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order staying the proceedings.

By **Section 5(1) of the Arbitration and Conciliation Act**any party who has been brought to Court based on an agreement subject to an arbitration clause can only insist on arbitration by applying to Court for stay of proceedings*before delivering any pleadings or taking other steps in the proceedings*.

Now, records show that the Defendants/Applicants in this case took steps in the instant suit by filing a motion for extension of time to file their notice of intention to defend which was heard by this Court and granted. The Defendants/Applicants filed their notice of intention to defend the suit against them on the undefended list. Records also show that when the suit was transferred to the general cause

list and pleadings ordered by this Court, the Defendants/Applicants filed their statement of defence and subsequently filed an amended version of same. It follows that the Defendants/Applicants not only took steps in this case but also delivered their pleadings. Having delivered pleadings and having taken other steps in the proceedings before this Court, the Defendants/Applicants had clearly decided to have this suit determined vide litigation and not arbitration. The Defendants/Applicants have by their actions submitted to the jurisdiction of this Court. The Defendants/Applicants can therefore no longer insist on their right to arbitration as contained under paragraph 8 of Exhibit A.

Considering**Section 5(1) of the Arbitration and Conciliation Act** the Court of Appeal held thus in ***CONFIDENCE INS. LTD. V. TRUSTEES OF O.S.C.E. (SUPRA) at PP. 387-388 paragraphs D-A****;*

> *"The second part of section 5(1) stipulates that any party to an agreement containing an arbitration clause "**may** after entering appearance **and before delivering any pleadings or taking any other steps in the proceedings** apply to the Court to stay proceedings" (emphasis supplied). Certainly, the right to stay proceedings is exercisable by either party to the agreement. This right is not couched on peremptory terms. In other words, it is at the discretion of a party to apply to the Court to stay proceedings. The question of this Court relying on the arbitration clause **suomotu** does not arise because any reliance on the clause must be at the instance of one of the parties. The right being one under a contract between the parties is a personal right. It can be waived. It may then be asked, what constitutes a waiver? The term waiver has an elastic meaning and it is often looked upon as a vague term, capable of being used in many senses. See **Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co.** (1940) 3*

All E.R. 60 at page 70. The noun "waiver" means the act or an act of waiving. To waive means to abandon, relinquish or dispense with one's right. A party waiving his right need not say so in many words because his action may speak louder than his words. Waiver involves a party making an election between two mutually exclusive rights. In the case on hand, the appellant had a right either to evoke the arbitration clause or to dispense with that right. He chose the latter and delivered his statement of defence dated 1st May, 1995. This is clearly a negation of the appellant's right to evoke the arbitration clause. It is worthy of note that appellant in its statement of defence, as 2nd defendant, averred as follows:-

> *"27. The Defendant says that the action is premature as the Plaintiffs are yet to utilise and or exhaust the arbitration provision in the trust in this case."*

The above averment cannot avail the appellant. Section 5(1) has stipulated the procedure for evoking the arbitration provision contained in the trust deed. In my view, it is not open to the appellant to invent or introduce his own mode for raising the right embedded in the arbitration clause. Indeed, at the time the appellant delivered his pleading the lower Court was full, siesed of jurisdiction to entertain the case between the parties and the question of reference to arbitration could no longer avail the appellant." (Underlining supplied by me for emphasis).

See also the cases of ***ABDULKADIR V. SALEH (2014) LPELR-24632(CA)*** *and* ***M.V. LUPEX V. N.O.C. & S. LTD. (2003) 15 NWLR (PT. 844) P. 469****.*

In sum, the Defendants/Applicants' act of delivering pleadings in the instant suit has denied this Court its power to order a

stay of proceedings for the purpose of giving effect to the arbitration agreement in Exhibit A as sought vide relief 1 and the first part of relief 2 of the instant application.

That is however not the end of the matter. The Defendants/Applicants have, vide an alternative prayer in relief 2 of the instant application, sought an order referring this suit herein to the Abuja Multi-Door Court in line with the extant rules of this Court.

Having filed pleadings, the Defendants/Applicants thereby lost their right to insist on the arbitration of their dispute for the purpose of enforcing their right to arbitration under paragraph 8 of Exhibit A, the window of opportunity to settle the dispute in this matter by arbitration is not totally closed to the Defendants/Applicants. They can still pursue arbitration of this matter with the consent of the Plaintiff/Respondent. This is where the provisions of Order 19 of the Rules of this Court may come into play. I have observed that the instant application was brought under the provisions of Order 19 Rules 1(1) and 2 of the Rules of this Court.Counsel to the Defendants/Applicants urged this Court to grant the instant application under this provision.

Order 19 Rules 1 and 2 of the High Court of the FCT, Abuja (Civil Procedure) Rules 2018 provide as follows:-

1. *It shall be the duty of a Court or a judge to encourage settlement of*
   Matters either by
   a) Arbitration
   b) Conciliation
   c) Mediation
   d) Or any other method of dispute resolution.
2.
   (1) Where parties consent to settlement of disputes, the Court or judge shall by an enrolment order as in

Form 15, refer the case to the AMDC for resolution within 21 days except otherwise ordered by the Court.

(2) Where a Court makes a referral the Court or judge shall by an enrollment order as in Form 15 refer the case to the AMDC for resolution within 14 days except otherwise ordered by the Court.

(3) *Where a party refuses to submit to ADR and loses the case in Court. He shall pay a penalty as may be determined by the Court.*

Under Order 19, parties who are already before the Court but are willing to pursue alternative means of settling their dispute may nevertheless have their case referred to the AMDC by the Court for settlement. Now this provision is available where the parties had no arbitration agreement in the first place or where an arbitration agreement is unenforceable such as a situation where one party had lost the right to insist on the arbitration agreement (as in the instant case). However, the condition for this Court to have power to refer the matter before it to the AMDC for settlement by arbitration or any other means of alternative dispute resolution is that ***ALL*** the parties must consent to having their matter resolved by settlement.

In the instant case, there is nothing in the Defendants/Applicants' affidavit to even remotely suggest that the Plaintiff/Respondent's consent has been obtained or given to the settlement of the instant suit by other means than litigation. In fact, I make bold to say that the Plaintiff/Respondent has made its position in respect of settlement clear by opposing the instant application.

Clearly, consent of parties has not been given to settlement of this suit by ADR. This Court therefore lacks the power to refer the instant suit for settlement to the Abuja Multi-Door Courthouse in line with the provisions of Order 19 Rule 2(1) of its Rules. This Court cannot do so with one unwilling party. The only power this Court has in the circumstances is under

Order 19 Rule 2(3) which is power to impose penalty on the unwilling party where it loses litigation at the end of the day.

Be that as it may, and in view of all the foregoing, the sole issue for determination must be resolved against the Defendants/Applicants and in favour of the Plaintiff/Respondent. The instant application lacks merit and it is accordingly dismissed.

HON. JUSTICE D. Z. SENCHI
(PRESIDING JUDGE)
18/02/2020

Parties:- Absent.
A.U.J Udoh:-For the Claimant.
I.W. Zom:-For the Defendant/Applicant.
Court:- Case adjourned to the 23rd April, 2020 for hearing.

Sign
Judge
18/02/2020