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/CV/2878/2018**
DATE: **18TH JUNE, 2020**

BETWEEN:

FOBY ENGINEERING COMPANY LIMITED - **CLAIMANT**

AND

NIGERIA – SAO-TOME & PRINCIPE JOINT DEVELOPMENT AUTHORITY } **DEFENDANT**

Parties absent.

C.I. Nkpe for the Claimant.

Abu Samson Adaweno for the Defendant holding the brief of Sheriff Mohammed Esq.

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

R U L I N G

The Plaintiff in this suit took out a writ of summons by way of Undefended List Procedure against the Defendant claiming the sum of:

1. $150,000.00 (One Hundred and Fifty Thousand United States Dollars) representing the outstanding balance owed to the Claimant in respect of the interest which accrued on the principal sum.

2. 10% Interest from the date of judgment until the judgment sum is liquidated.
3. Cost of the suit.

When served with the writ of summons, the Defendant filed a Notice of Preliminary Objection dated 12/11/2018 challenging the competence of this suit and the jurisdiction of this Honourable Court to entertain and determine same.

The grounds of the objection are as follows:

1. The Claimant's suit being an action premised on contract is statute barred by virtue of the Contract Limitation Act CAP522 LFN Abuja.
2. Section 7(1) of the said Act provides that "***The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued"***
   (a) Actions founded on Simple Contract.
   (b) Actions founded on quasi contract.
   (c) ....."

In support of the application is 4-paragraph affidavit dated 12/11/2018 deposed to by Stanley Dien, a counsel in the law firm of I.Y. Yahuza Esq. Attached thereto are 4 documents marked as Exhibit AA, AA[1], CC and EE respectively.

Learned counsel filed 6-page written address wherein counsel formulated a lone issue for determination to wit:

"Whether this suit is not statute barred by virtue of the Contract Limitation Act CAP 522 LFN Abuja"

On this issue, it is the submission that from the onset, this matter was caught by the Contract Limitation Act CAP 522 LFN Abuja and was not only statute barred but was instituted on 26th September 2018, a period of more than six years after the accrual of the cause of action on 1st December 2010 when the Claimant demanded for Performance Bond Cash Deposit or on the 9th December 2010 when the Defendant through its letter of same day notified the Claimant of the refund payment to the Claimant's account with United Bank for Africa vide Wire Transfer and in which letter informed the Claimant that ***"by this transfer, all liabilities of JDA in respect of the cash deposit have been conclusively extinguished"*** hence this Honourable Court lacks the requisite jurisdiction to entertain and determine an incompetent action *ab initio*.

Submits that it is trite that in considering application of this nature, it is only the Claimant's Statement of Claim, in this case the affidavit in support of Undefended list action and the affidavit in support of the Defendant's preliminary objection that are looked into. A careful look at the Claimant's affidavit in support of its undefended list action will reveal that by paragraph 14 of the Claimant's supporting affidavit the Defendant on 15th December 2010 returned the outstanding balance of claimant's outstanding bond cash deposit in the sum of $1,129,150 USD.

Submit that by the above averment, aside from confirming receipt of its outstanding cash deposit from the Defendant has by its concluding averment that its principal sum had been returned "leaving all the interest accrued on the deposit unpaid", created a false impression to show as if interest payment was part of their contract and had demanded for its payment from the Defendant before the refund of its balance deposit aforesaid. The truth is that there was no prior demand for the payment of interest element because there is no basis for it; same not being part of the contract interpreters.

Submits that by paragraph 15 of the Claimant's supporting affidavit, the Claimant confirmed that it was only on the 23rd February, 2017 some 7 clear years after receipt of complete refund of its deposit from the Defendant that the Claimant wrote a letter through the President of the Defendant demanding for the sum of $587,756.67 representing the interest that accrued on the deposit.

The implication of the above averment is that the Claimant from the 15th Day of December 2010 when it confirmed receipt of outstanding balance of its deposit from the Defendant went to sleep and only woke up some 7 years after to write a demand letter on 23rd February 2017 for payment of interest element on its cash deposit received since seven years back.

Submits that the computation of the limitation period cannot be commenced from the 23rd February 2017 when the Claimant demanded for the interest again, from the period between

December 15th 2010 when the Claimant received its fund and the 23rd February 2017 when the Claimant purportedly demanded payment of interest is some seven clear years which is a period more than six years allowed by the Limited Act to file action premised on contract. See MIN. OF FCT v M.H. (NIG) LTD (2011) 9 NWLR (Pt 125 P. 272 @ Paras D – B; OKENWA v MIL. GOVT. IMO STATE (1997) 6 NWLR Pt 507 154.

Further submits assuming but not conceding that the Plaintiffs have a cause of action in this suit, by the said law to sue to recover the debt after the lapse of 6 years reason being that the claim if it existed, had become stale claim and therefore unenforceable. See ERESIA-EKE v ORIKOHA (2010) 8 NWLR Pt 1197 Pg 421 at 446 Para A.

In conclusion, learned counsel urged this Honourable Court to dismiss this suit in its entirety for being stature barred; more so when it is trite law that equity does not aid the indolent.

In opposition to this application, learned counsel to the Claimant submits that he has filed a reply to the preliminary objection dated 25/2/2019.

I have carefully perused through the entire file but could not lay my hands on the said reply. However, the only document in opposition to the Defendant's Notice of Preliminary Objection is a 6-paragraph counter affidavit dated 3/12/2018 deposed to by Kingsley Odey, a legal practitioner in the law firm of Concise I.

Nkpe & Co. Attached thereto are 18 documents marked as Exhibits FEL[1] – FEL[18].

Learned counsel also filed 3-page written address wherein counsel adopted the sole issue as formulated by the defendant/objector to wit: ***"Whether this suit is not statute barred by virtue of the Contract Limited Act CAP 522 LFN Abuja"***

It is the contention of the Claimant that from the contents of the counter affidavit and the documents attached thereto, the contract upon which the Claimant paid the sum of $1.4 Million United States Dollar is still alive until the 8th Day of June, 2033. Further that the cause of action in this suit arose on the 17th Day of July 2017 and not December 9th, 2010 as alleged by the defendant.

It is also the contention of the Claimant that Exhibit AA attached to the Defendant's affidavit in support of the Notice of Preliminary Objection is regulated and subject to the provision of Exhibit FEL[1] attached to the counter affidavit.

Submits that Exhibit EE attached to the Defendant's affidavit in support of the Notice of Preliminary Objection is of no consequence as it has been overtaken by events that took place thereafter.

In conclusion, learned counsel to the Claimant urged this Honourable Court to dismiss the preliminary objection as it is lacking in merit and an attempt to delay the hearing of this suit.

Learned counsel to the defendant/Objector filed a 5-paragraph Further Affidavit in support of the preliminary objection dated 10/12/2018 deposed to by Stanley Dien, a counsel in the law office of I.Y. Yahuza Esq. Lead Counsel to the Defendant attached thereto is a document marked as Exhibit "MM". It is the deposition in paragraph 4c that the Claimant in demanding for the release of its $1,129,150.00 Cash Deposit in lieu of Performance Bond vide letter of 1st December 2010 or Exhibit CC to the Defendant's preliminary objection deceived the Defendant that it will issue a Bank Guarantee for the sum of $1,129,150.00 which it never did till date.

Deposed in paragraph 4d that the failure on the part of the Claimant to issue the said bank guarantee has automatically terminated the contract and the Claimant cannot come after seven years to ask for any interest even if is entitled to it.

I have carefully considered the processes filed and the submission of learned counsel on both sides. The general principle of law is that where a statute provides for the institution of an action within a prescribed period, proceeding shall not be brought after the time prescribed by such statute. Any action that is instituted after the period stipulated by statute is totally barred as the right of the injured person to commence the action would have been extinguished by law. See IBRAHIM v JIDICIAL SERVICE COMMITTEE (1998) 1 SCNJ 255 at 272 – 273.

Similarly in ITF v NRC (2007) 3 NWLR (1020) 28 it was held that in the determination of whether or not an action is statute barred, the

court looks at claim alleging when the wrong, which gave the Plaintiff the cause of action, was committed, then compare the date with the date on which the writ of summons was filed. If the date on the writ is beyond the period allowed by the Limitation Law, then the suit is statute barred and the court is without jurisdiction to entertain it.

In the instant case, a careful perusal of the claims of the Claimant is anchored on the agreement entered between the Claimant and the Defendant on the 17th Day of July 2017 wherein the Defendant has started complying with the terms of the agreement in part and paid the 1st instalment in the sum of $100,000. Upon maturity of the 2nd instalment, the defendant refused to honour the agreement, consequent upon which the Claimant's president signed a letter of demand for payment and notification of interest accrual to the Defendant on the 2nd November 2017.

Looking at the statement of claim and the agreement which gave rise to this action, the agreement was signed on the 17/7/2017 while the case was filed on the 26/09/2018, a period of about 1 year 2 months.

It is the contention of the Defendant/Objector that the terms contained in the Offer letter dated 9th June 2005 which the Claimant was awarded 5% participating interest in the Joint Development Zone (JDZ) Block 2 terminated on the 15/12/2010 when the Defendant refunded the outstanding balance deposit of $1.129,150 USD.

By the content of Clause 4.1 of "FEL1, the fix duration of the contract between the parties herein is for a period of 28 (twenty eight) years commencing from 9th June 2005 terminating on the 8th of June 2033.

It is worthy of note that, often times when a defence of statute of limitation is set up against an action, there may be dispute as to the date of the accrual of action, and when such situation arises, it is the duty of the trial court not to determine it as a question of act until evidence has been called on the issue. See KASANDUBU v ULTIMATE PETROLEUM LIMITED (2008) 7 NWLR (Pt 1086) at 274.

In the instant case, the Defendant/Objector is of the view that the terms contained in the Offer letter dated 9/6/2005 which the Claimant was awarded 5% participating interest in the Joint Development Zone (JDZ) Block 2, terminated on the 15/12/2010 when the Defendant refunded the outstanding balance deposit of $1,129,150 USD; while the Claimant is of the view that by the content of Clause 4.1, the contract between the parties is for a period of 28 years; commencing from 9/6/2005 and terminating on the 8/6/2033 and the cause of action in this suit arose on the 17/7/2017; consequent upon Exhibit FEL[12].

In the light of the contradiction in the dates as to when the cause of action arose and the decision in the case of KASANDUBU v ULTIMATE PETROLEUM LTD (Supra) at the back of my mind, this court is of the considered view that the preliminary objection

under consideration is lacking in merit; accordingly it is hereby dismissed.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
18TH JUNE, 2020

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R U L I N G

By a writ of summons brought under the Undefended List Procedure dated 26/9/2018, the Plaintiff claims against the Defendant as follows:

1. The sum of $150,000.00 (One Hundred and Fifty Thousand United States Dollars) representing the outstanding balance owed the Claimant in respect of the interest which accrued on the principal sum.
2. 10% Interest from the date of judgment until the judgment sum is liquidated.
3. Cost of the suit.

In support of this claim, the Claimant filed 38-paragraph affidavit dated 26/9/2018 deposed to by Esume Felix Dumebi the

Company Secretary/Legal Adviser to the Claimant. Attached to the affidavit are 18 documents marked as Exhibits FEC[1] – FEC[18].

Upon being served with the originating processes, the defendant entered a Conditional Appearance and filed a Notice of Intention to Defend dated 12/11/2018 with Notice of Counter Claim also dated 12/11/2018. Also filed by the defendant is 4-paragraph affidavit in support of the Notice of Intention to Defend dated 12/11/2018 deposed to by Stanley Dien, a counsel in the law firm of Y.I. Yahuza Esq. Attached to the affidavit are 7 documents marked as Exhibits AA, AA1, BB, CC, DD, EE and FF respectively.

I have carefully considered the affidavit and exhibits attached thereto by the parties. It is trite law that a suit is maintainable under the undefended list if it relates to a claim for a debt or liquidated money demand. See GARBA v SHEBA INT. NIG LTD (2002) 1 NWLR (Pt 748) 371.

It is also trite that where there is a conflict in the affidavits of parties under the undefended list procedure, evidence is the only way by which the conflict can be resolved and it is mandatory to enter the suit on the general cause list. See EBONY v VIKPE (2002) 17 NWLR (Pt 997) 504.

In the instant case, there is no doubt that there are conflicts in the affidavit of the parties that should be resolved by oral evidence. For instance, in paragraph 15 of the Claimant's affidavit, it is deposed that the Claimant wrote a letter through the president of the Defendant, demanding for the sum of $587,756.67

representing the interest that accrued on the deposit, while the Defendant in paragraph 3Li deposed that no agreement Interparties provides for payment of any interest to the Claimant on the cash deposit in lieu of performance bond.

Similarly, in paragraph 13 of the Claimant's affidavit, it is deposed that on the 6th Day of August 2009, the Defendant refunded the sum of $270,850 (Two Hundred and Seventy Thousand Eight Hundred and Fifty United states Dollars) back to the Claimant out of the principal sum leaving a balance of $1,129,150.00 (One Million, One Hundred and Twenty Nine Thousand, One Hundred and Fifty United States Dollars) while in paragraph 3j of the Defendant's Affidavit, it is deposed that as at 31st December 2009 when the Claimant requested for reduction of its Performance Bond Deposit by $270,850 USD and 1st December 2010 when it demanded complete refund of its outstanding balance deposit of $1,129,150 USD, the Claimant did not ask for payment of any interest.

From the above conflicts in the affidavit and the exhibits attached thereto, I hold the considered view that there are triable issues and/or defence on the merit that would warrant the transfer of this case to the general cause list.

Accordingly, this suit is hereby transferred to the General Cause List for trial. I order parties to file their respective pleadings.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
18/06/2020

Claimant's Counsel – We thank the court for the ruling and we shall abide by it.

Defendant's Counsel – We accept the ruling of the court.

Court – Suit adjourned to 24/9/2020 for hearing.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
18/06/2020