IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT HIGH COURT MAITAMA –ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS:	**JAMILA OMEKE & ORS**
COURT NUMBER:	**HIGH COURT NO. 33**
CASE NUMBER:	**SUIT NO. FCT/HC/CV/1387/19**
DATE:	**18TH JUNE, 2020**

BETWEEN:

CROWN RESOURCES DEVELOPMENT COMPANY LTD……APPLICANT

AND

VERGNET WIND ENERGY LTD……RESPONDENT

APPEARANCE
M. A. Ojile Esq for the Claimant.

Claimant is absent.

Defendant is absent and unrepresented.

Applicant's: WE are apologise for coming late.

RULING

On the first application filed on 21/05/2019 dated same date, brought pursuant to Section 4 and 5 of the Arbitration and conciliation Act, Cap A18 laws of the Federation of Nigeria 2004 order 43 Rule 1 of the Rules of this court 2018 and under the inherent jurisdiction of this Honourable Court.

The Applicant herein prayed the court for the following orders:-

1) An order of this Honourable Court staying further proceeding (s) in this suit pending reference of the dispute to Arbitration in accordance with the parties written contract.
2) And for such further order (s) as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application was predicated are contained on the motion paper.

Filed in support of the motion is a 6 paragraphed affidavit deposed to by one Ugye Daniel Mathew a litigation Clerk at Templars, counsel to the 1st Defendant/Applicant attached to the supporting Affidavit is an annexture marked as Exhibit V1.

Equally filed in support of the motion is a written address dated the 21st May, 2019.

In the said written address the learned Applicant counsel formulated a lone issue for determination which is having regard to the terms of the contract between the Applicant and de Respondent should this Honourable Court stay these proceedings pending arbitration of the Respondent's Claim?

In arguing the issue, counsel stated that contractual disputes such as the one between the Applicant and the Respondent it is firmly settled that a court has the power to stay its proceedings in favour of arbitration if:- (the disputants have agreed in writing to arbitrate their dispute; and (b) the party making the request for a stay has taken no steps to defend the claim before the court. Reference was made to sections 4 (1) and 5 (1) of Arbitration and conciliation Act as well as the case of M. Y. LUPEX VS N. O. C& LTD (2003)15 NWLR (PT. 844) 469 at 488, paragraph G.

On the Constitutions which must guide a court when a request for stay of proceedings pending arbitration is made, counsel referred the court to the following cases, K.S.U.D.V FAN 2 CONSTRUCTION COMPANY LTD (1999) 5 NWLR (PT. 142); OBEMBE VS WEMABOO ESTATES LTD (1977) 11 NSCC264.;ONWARD ENT. LTD VS MW MATRIX (2010) 2 NWLR 530.

Consequently, counsel submitted that these considerations favour the grant of this application that these is a valid agreement to arbitrate between the Applicant and the Respondent, the Respondents present claims before this Honourable Court falls within the scope of that agreement to arbitrate, the Applicant has taken no step in the proceedings that could defeat the agreement to arbitrate and if the Respondent initiate the arbitration the Applicant is both ready and willing t ensure its proper conduct.

Furthermore, counsel referred the court to the supporting Affidavit and submitted that the relationship of the Applicant and the Respondent is grounded by a suite of contractual documents. Therefore counsel referred the court to Article 15.3 of the General conditions of contract and the special conditions of contract and submitted that the Applicant and Respondent intended for all disputes or differences which arise in connection with the contract to be settled ultimately by arbitration.

Consequently, counsel urged the Court to recognize and give full effect to the arbitration agreement.

In another submission, counsel stated that the filing of a formal memorandum of appearance does not cannot as a step in the proceeding by an applicant for a stay of proceedings pending arbitration. Reliance was placed on the cases of CISI ENTERPRISES LIMITED VS KOGI STATE GOVERNMAENT (2005)1 NWLR (PT. 908) page 494.

The learned counsel stated that this Honourable Court's record will confirm that beyond filing a formal memorandum of conditional appearance, the Applicant has not filed any processes or taken any other steps towards defending the Respondent's claims in these proceedings.

Also, the learned counsel referred the court to paragraph 4 (x) of the supporting Affidavit and stated that the Applicant has confirmed on oath its readiness and willingness to participate in and do all things necessary to ensure the proper conduct of arbitration if and when the Respondent commence on.

To this end, counsel submitted that this Honourable Court ought to answer the sole issue for determination in the affirmative. These foe counsel urged the court to grant the prayer for a stay of these proceedings in order that the dispute between the parties will determined in accordance with the mechanism prescribed in the contract.

In opposing the application the Claimant/Respondent filed 7 Counter Affidavit of 8 paragraphs deposed to by one Leonard Enesi Ojiah, an employee and the property/investment Manager of the Claimant/Respondent. Attached to the Counter Affidavit are annexture marked as Exhibit A01 to A04 respectively.

Also filed in support of the Counter-Affidavit is a written address dated 22nd November, 2019.

In the said written address, learned counsel to the Claimant/Respondent Ojile Abah Nathanial Esq, formulated two issues for determination thus:-

1) Whether in the light of Exhibit A03 and Exhibit A04 herein the 1st Defendant/Applicant has not been given sufficient and express notice by the Claimant/Respondent to warrant them submitting to Arbitration in line with claims 15 of the general condition of the contract but which they wailed.
2) Whether the deposition in the supporting affidavit to the motion on notice of the 1st Defendant/Applicant is in compliance with the provisions of Section 117 of the Evidence Act, 2011 as Amended.

In arguing the issues counsel submitted on issues one that the 1st Defendant/Applicant has waived his light and in fact cost it totally to insist that they had no knowledge of the dispute between the parties. He cited in support the cases of OLATUNDE VS OAU & ANOR (1998) LPELR- 2575 (SC); NIGERIA PORTS PLC VS DUNCAN NARUTIME VENTURES (NIG) LTD (2010) LPELR -4602.

As such counsel submitted that the Claimant/Respondent has done what is expected to her in the contract agreement dated 22nd May, 2014 between her and the 1st Defendant/Applicant to warrant the institution of this instant suit before this Honourable Court.

The learned counsel referred the court to Exhibits A03 and A04 and stated that it does not lie in the mouth of the 1st Defendant/Respondent to say that they were not informed or waited by the Claimant/Respondent that dispute had …….firm the contract agreement and for them to take full advantage of clause 15 of the contract agreement to appoint their arbitration.

In his further submission, counsel stated that the 1st Defendant/Applicant having waivered their right cannot be held to say and in fact does not lie in their mouth to allege that the Claimant/Respondent has not done what is expected of her.

Consequently counsel contended that the 1st defendant/Applicant's instant application is nothing but a ruse deplored to delay this suit from going into hearing and urged this Honourable Court to resist the temptation and order the hearing of the suit.

On issue two, counsel submitted that the deposition by one Ugye Daniel Mathew in the supporting affidavit of the 1st Defendant/Applicant should be discontinued and refused as it negates the provisions of Section 117 of the Evidence Act, 2011, as amended.

The learned counsel urged this Court to take a cursory look at the office address of the learned silk on the processes before the court and that of the deponent and will discover that they are one and the same, while counsel submitted contravene the provision of Section 117 of the Evidence Act (Supra).

Counsel stated further that what is required of the deponent in his residential address and not any other address and counsel submitted that the provisions of the law are merit to be strictly followed and complied with.

Consequently, counsel urged the court to hold that the failure of the 1st Defendant/Applicant's to comply strictly with the provisions of the law is not a mere irregularity but an illegality. Reliance was placed on the cases of UGBOJI VS STATE (2017) LPELR-43427 (SC);SANMABO VS THE STATE (1967) NWLR 314 at 317; SALAMI OLONJE VS IGP (1955-56) WRNLR 1; AMOKEODO VS I.G.P (1999) 6 NWLR (PT. 607) 467.; THE STATE VS GWONTO (1982) NSCC 104.

As such counsel urged the court to resolve the two issues in favour of the Claimant/Respondent.

To this end counsel prayed the court to dismiss the application of the 1st Defendant/Applicant with cost for lacking in merit and being brought in bad faith.

The Applicant filed a further affidavit of 11 paragraphs deposed to by one Denial Ugye a litigation Clerk at Templars, the firm of legal practitioners acting for the 1st Defendant/Applicant attached to the further Affidavit is an annexture marked as Exhibit V2. Equally filed alongside the further Affidavit is a written reply on point of law dated the 27th day of January, 2020.

In his reply on point of law counsel referred the court to Section 17 of the Arbitration and conciliation Act, clause 15 of the General Conditions of contract and paragraph 5 (b) of the Applicant's reply Affidavit and stated that there is no evidence before this Honourable Court that the Respondent served the Applicant with a notice of adjudication/arbitration.

The learned counsel stated moreso that Exhibits A03 and A04 relied on by the Respondent are merely correspondences between the parties while attempting to settle the Respondent's claim amicably and cannot by any stretch of the imagination qualify as a proper notice of arbitration and conciliation Act.

In his further contention learned counsel stated that the Respondent did not at any point in time initiate or commence arbitration proceedings in the manner agreed upon by the parties under clause 15 of the contract Agreement. That no arbitration was appointed at any point to settle the dispute between the parties.

Consequently, counsel urged the court to rely no the guidance provided in clause 15 of the contract Agreement and the Rules of Adjudication and discontinuance the argument of the Respondent that it took steps to commence arbitration.

On the Respondent's argument that the Applicant has waived its right to arbitrate the presents dispute counsel stated in his reply on points of law that Exhibits A03 and A04 are extraneous to the arbitration agreement and ought to

be discontinued and urged the court to so hold. Reliance was placed on the cases of UNION BANK (NIG) LTD VS OZIGI (1994) 3 NWLR (PT. 333) 385.; AONDO VS BENUE LINKS (NIG). LTD (2019) LPELR -46876 (CA). GABRIEL OLATUNDE VS OBAFEMI AWOLOWO UNIVERSITY & ANOR (1998) LPELR- 2575 (SC); M. U LUPEX VS M.O.C & S LTD (2003) 15 NWLR (PT. 844).

Moreso, counsel referred the Court to paragraphs 4 (g) and (h) of the Respondents Counter Affidavit and stated that the Respondent admitted that Exhibit A04 only acknowledges Exhibit A03. As such counsel submitted that it is the law that facts not disputed are deemed as admitted/established and require no further proof. Reliance was made to Section 123 of the Evidence Act 2011 and the case of FUTMINA & ORS VS OLUTAYO (2017) LPELR-43827 (S).

In this regard counsel urged court to discountenance the Respondent's argument and grant the application for stay as the Applicant led by its affidavit in support of the application shown that there is no reason to refuse referral of this dispute to arbitration and has also declared its willingness and readiness to defer to arbitration.

In his further reply on points of law, the learned counsel submitted that the argument of the Respondent's counsel is misplaced and also speculate because the deponent does in fact reside at the said address, No. 6 Usome Close, Off Gana Street, Maitama, Abuja, as the said address houses an office building and 9 residential apartment annex for staff.

He further contended that the argument of the Respondent's counsel is unsustainable because Respondent only suggested that the deponent to the affidavit in question cannot reside at the same address that houses the office building of the counsel to the Applicant but failed to demonstrate to this Honourable Court what precludes the deponent firm residing at the office address of the counsel to the Applicant or if it knows where truly the deponent resides. As such counsel submitted that it is trite law that he who assert must prove. He cited in support the case of DASUKI VS F.R.N & ORS (2018) LPELR-43897 (SC).

Therefore, counsel stated that the Respondent having failed to justify its assertion, his argument should be discontinued.

Furthermore, counsel stated that assuming without conceding that the Affidavit of Danieal Ugye is detejue by any stretch of imagination he submitted that failure of an affidavit to comply with the provisions of the Evidence Act is not fatal, especially where the defeat is a to form," such defeat is a were irregularity which the court can overlook or order tobe rectified, so fer as the court is satisfied that the Affidavit was deposed to before the appropriate authority. Reliance was placed on the cases of OSASUYI VS MUDASHIRU (2015) 4 NWLR (PT. 1449) 201 AT 204; MADUKA VS UBAH (2015) 11 NWLR (PT. 1470) 201; AND FORT ROYAL HOMES LTD & ANOR VS EFCC & ANOR (2017) LPELR-42807 (CA).

Finally, counsel urged the court to dismiss the Respondent's contentions in the Counter-Affidavit and written address of 13th November, 2019 file in response to the Applicant's application and prayed the court to grant all the reliefs the applicant seeks, there being no factual or legal basis to deny same.

I have carefully perused the motion on notice, the reliefs sought, the affidavit in support, the annextures attached therewith and the written address in support. I have equally give through the counter affidavit in opposition to the motion together with the annextures attached to the counter affidavit and the written address in support of same.

In the same vein, I have studied carefully the Applicant's further affidavit and the reply on points of law.

In view of the above therefore, I am of the opinion that the issue for determination is whether the Applicant herein has made out a case for the grant of this application as prayed.

It is …….to begin by saying that the processes filed in this suit, it is clear that there is a contract agreement between the parties as evidenced by Exhibit 11 attached to the Applicant's supporting affidavit. The contract bothers on Construction of 2x7.5 MYA KATSINA 10MW Wind Farm Liyafa substation in Katsina State-Nigeria.

As such it is settled law that parties one bound by the terms of their written address contract. In this respect see the case of S.P.D.C (NIG) LTD VS EMEHURU (2007) 5 NWLR (PT. 1027) 347 at 367 paragraphs A-C where it was held thus:-

> ***"……Written contract agreement entered into by parties are binding on the same. Where there is any disagreement between parties to such written agreement on any particular point as in the instant case between respondent and the applicant, the only reliable evidence and legal source of information to resolve the claim and denied on the employment is the written contract executed by the parties ……."***

See also the case of LARMIE VS D.P.M.S LTD (2005) 18 NWLR (PT. 958) 438, 459-D.

An x-ray of the contract agreement i.e Exhibit v1 attached to the supporting affidavit will show clearly that parties agreed under special contractors of the contract at clause 15 and General Condition particularly at clause 15.3 that there should be arbitration the event of a dispute arising there from.

For ease of reference, I shall reproduce hereunder clause 15.3 of the General Condition. It reads thus:-

> ***"A dispute which has been the subject of a notice of dissatisfaction shall be finally by a single arbitrator under the Rules specified the Appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and in the language referred to in sub-clause1.5."***

In this respect, I refer to the case of NIKA FISHING CO.LTD VS LAVINA CORPORATION (2008) 16 NWLR (PT. 1114) 509 where Supreme Court per NIKI TOBI. (JSC) said thus:-

> ***"It is the law that parties to an agreement retain the commercial freedom to determine their non terms. No other person, not even the court can determine the terms of contract between parties thereto. The duty of the court is to strictly interpret the terms of the agreement on its clear terms."***

There is no doubt that dispute has arisen as can be seen for the originating processes filed by the Claimant/Respondent. Therefore, firm the unambiguous wordings of clause 15.3 of the general conditions reproduced above the simple interpretation that can be given to same is that parties to the contract agreement intended to arbitrate their dispute whenever it comes up. I so hold.

At this juncture, I refer to Section 5 (1) & (2) of the Arbitration and conciliation Act, Cap A18 laws of the Federation of Nigeria 2004. I shall also reproduce same here for ease of reference.

Section 5 (1) provides thus:-

"If any party to an arbitration agreement ……any action in any court, with respect to any matter which is the subject of an arbitration agreement may at any time after appearance and before delivering any pleading or taking any other steps in the proceedings apply to the court to stay the proceedings".

Section 5 (2) provides thus:-

"A court to which an application is made under sub-section (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 amended still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings."

The question that comes to mind at this point is has the Applicant herein filed or deliver pleading or taking any other steps in the proceeding after appearance?

Before I dwell on this question, it should be pointed out here that the claimant/Respondents counsel submitted that the Applicant has waived its right to arbitration having received Exhibit A03 and subsequently reply on Exhibit A04.

I must say here that I have gone through the said Exhibits and I find the submission of the learned counsel to the Claimant/Respondents with due respect early strong because I do not see anything therein suggesting waived on the part of the applicant. To fortify my position I refer to the case of AUTO IMPORT EXPOERT VS ADEBAYO (2005) 19 NWLR (PT. 959) 44 at 122-123 paragraphs H-G, where it was held that:-

> ***"It need be stressed and this is settled, that waiver, is the international and voluntarily surrender or relinquishment of a known privilege or right by a party entitled to the same, which, at his option, he could have insisted upon***

In the light of the above, I hereby discountenance the submission of the Claimant/Respondent's counsel and would very strongly that the Applicant has not waived its right to arbitration.

Coming back to the question above, I have taken judicial notice of the entire processes filed in this suit, apart from the memorandum of conditional appearance filed by the Applicant, the Applicant has not taken any further steps. Therefore this is in line with the conditions stipulated in Section 5 (1) of ACA (Supra). In this respect, I refer to the case of SINO-AFRIC AGRICULTURE & IND. COMPANY LTD & ORS. VS MINISTRY OF FINANCE INCORPORATION & ANOR (2013) LPELR-22370 (CA) at 34-36, paragraphs B-G where it was held inter alia thus:-

> ***"……..By virtue of Section 5 the court has a jurisdiction to stay proceedings pending the determination of the arbitration. This remedy is discretionary and the court will be satisfied of the merits of the Application. I must however stress that the most important and major qualification here is that the Defendant must have not delivered any pleadings or taken any steps I the proceedings beyond entering a formal appearance…"***

Furthermore, from the supporting affidavit of the Applicant particularly at paragraph 4 (x) the Applicant deposed therein thus:-

"The Applicant confirm that it is ready and willing to participate in the contractual framework for resolving the Respondents claim including participating in arbitration if the Respondent commences one. Further the Applicant shall do all thing within its powers to ensure the proper conduct of any arbitration the Respondent commences".

To this end, I am satisfied that there is no sufficient reason before one why this matter should not be referred to arbitration in accordance with the arbitration agreement. I so hold. Consequently, I hereby resolve the issue for determination in favour of the Applicant against the Claimant/Respondent.

Before I commence let me say brightly that on the submission of the Claimant/Respondent's counsel that the Applicant's supporting Affidavit contained the provision of Section 117 of the Evidence Act, 2011 (as amended), I need not say much on this because I aligned myself with the submission of the Applicant's Counsel in his reply on point of law on that point. To that extend, I equally discontinuance the said submission of the learned Claimant/respondent's counsel.

In light of the foregoing, the proceedings in this suit No. CV/1387/19 should and is hereby stayed and matter is referred to arbitration in line with the contract agreement between the parties.

On the said motion dated 21st May, 2019 and filed same day. The motion was brought pursuant to orders 13 Rule 18 (2) & 19 and 43 Rule 1 (1) & (2) of the Rules of this Court, 2018 and under the inherent Jurisdiction of this Honourable Court.

The 2nd Defendant/Applicant herein prayed the court for the following reliefs:-

1) An order dismissing/striking out the plaintiffs claim against the applicant for non disclosure of any justifiable cause of action. OR IN THE ALTERNATIVE.
2) An order striking out the name of the Applicant from the suit.
3) Any other orders as this Honourable Court may deem fit to make in the circumstances of this case.

The grounds upon which this application was predicated are contained on the face of the motion paper.

Filed in support of the motion is 8 paragraphs affidavit deposed to by one Ugye Daniel Mathew a litigation clerk at Templars (Baristers & solicitors) counsel to the Applicant. Attached to the supporting Affidavit is an annexture marked as Exhibit Vi. Also filed is a written address in support of the motion on notice.

In the said written address learned counsel to the Applicant formulated a lone issue for determination thus:-

Should this Honourable Court dismiss/strike out the Claimant's Claim a garnet the Applicant?

In arguing the issue, counsel submitted that there is no justification for the Applicant inclusion in these proceedings by the Claimant. The learned counsel stated further that the court is required to assess the claim presented against the Applicant in the Claimant's Affidavit and documents in support of the Claimant's writ on the undefended list, and nothing more. In support, he acted the cases of TAIWO VS ADEGBORO (2011) 11 NWLR (PT. 1259) 562; BOLAJI VS BAMGBOSE (1986) 4 NWLR (PT. 37) 362 at 364.

In another submission, counsel stated that the claimant's claim disclose no justifiable cause of action against the Applicant. Reliance was made to the cases of ALESE VS ALADETOYI (1995) 6 NWLR (PT. 403) 527 at 541. RINCO CONST. VS VEEPEE IND. LTD (2005) 9 NWLR (PT. 926) 85.

Moreso, counsel referred the court to paragraphs 7 and 8 of the of the Climate's Affidavit and stated that the claimant's action is purely founded upon a contractual agreement and that the Claimant's cause action of action is the alleged non-performance of a contract obligation by the Claimant's contractual Counter-Affidaivt.

In his further submission, counsel stated that the claimant has not presented any fact in its processes in these proceedings that show a cause of action in its favour and aganet the Applicant again, counsel submitted that where

a reasonable cause of action is not disclosed against a party, the only option left for the court is to strike out the claims against the party concerned. Reliance was made to the cases of ORUMMOND-JACSON VS BRITISH MEDICAL ASSOCIATION (1970) 1 WLR 688; IBE VS AHMEND (1992) 4 NWLR (PT. 235) 311 at 319-320.

Consequently, counsel urged the court to strike out the claimant's Claim against the Applicant and discharge the applicant from any further participation in these proceedings.

Furthermore, counsel submitted that the Applicant is not a proper, necessary or desirable party to this suit and therefore is improperly joined as co-Defendant. As such counsel urged the court to excuse the applicant from further participation in the proceedings by an order striking out its name. Reliance was placed on order 13 Rule 18 (2) of the Rules of this court and the cases of CHIEF ABUSI GREEN DAVID VS CHIEF DR. E.T. DULBIN GREEN (19987) 3 NWLR (PT. 61) 480 at 498; GLOBAL WEST VESSEL SPECILST (NIG) LTD VS NIGERIA NLG * ANOR (2017) LPELR-41987 (SC).

In determining whether to join a person as defendant to a suit, counsel referred the court to the case of BELLO VS INEC (2010) 8 NWLR (PT. 1196) 342 at 418, paragraph C-F.

In another submission counsel stated that the Claimant's depositions it is Affidavit reveals that the Applicant, at best is an agent of the 1st Defendant as far as it concerns performance of the contract between the Claimant and 1st Respondent. The learned counsel referred the court to paragraph 5 of the Claimant's Affidavit.

In his further submission counsel stated that an agent (the Applicant) of a disclosed principal (the 1st Defendant) cannot be sued for the action, it takes on its principal's belief because those actions are in law imputed on its principal (the 1st Respondent in this suit). He cited in support the cases of SAMUEL OSIGER VS PSPLS MANAGEMENT CONSTRUTIUM LTD & ORS (2009) 3 NWLR (PT. 1128) 378 SC; ORIBOSI VS ANDY SAM IVSTEMETN COMPANY LTD (2014) LPELR-23607.

Therefore, counsel submitted that the claimant has wrongly sued the Applicant in this case and urged the court to dismiss all Claimant's claims against the Applicant and strike out the Applicant name in this suit.

Finally, counsel urged the court to answer the sole issue for determination affirmatively and grant the reliefs sought in the Applicant's Application.

In opposing the application, the Claimant/Respondent filed 6 paragraphs Counter-Affidavit deposed to by one Leonard Enesi Ojiah, an employee and the property investment Manager of the Claimant/Respondent. Equally filed in support of the Counter Affidavit is a written address dated 22nd day of November, 2019.

In the said written address counsel to the Claimant/Respondent formulated two issue for determination namely:-

1. Whether the 2nd Respondent/Applicant having itself vat to the Claimant/Respondent as being one and the same with the 1st Defendant/Respondent can be excused from the breach of contract of the letter.
2. Whether the deposition in the supporting Affidavit to the motion on notice of the 2nd Defendant/Applicant is in compliance with the provisions of Section 117 of the Evidence Act, 2011 as Amended.

In arguing the issues, counsel submitted on issue one that the contractual transaction between the 1st Defendant/Respondent and the Claimant/Respondent had the full backing and correct of the 2nd Defendant/Applicant herein. Moresore that the 2nd Defendant/Applicant had in the post prior to the institution of this suit, acted for, caste and received correspondences from the Claimant/Applicant for the 1st Defendant/Respondent. That the 2nd Defendant/Applicant even made payments to the Claimant/Respondent for work done for the 1st defendant/Respondent.

Consequently, counsel submitted that the 2nd Defendant/Applicant has held itself out by its conduct to be one and the same with the 1st Defendant /Respondent and prayed the court to refuse its prayers to be excused from this

instant suit. Reliance was made to the cases of OKONKWO & ORS VS KPAJIE & ORS (1992) LPELR- 2483 (SC) JOE IGA & ORS VS EZEKIEL AMAKIRI & ORS (1978)11 S.C also referred to is Section 169 of the Evidence Act.

Furthermore counsel referred the court to paragraphs 24, 25, 26 and 29 of the 2nd Defendant/Applicant's written address and stated that while they concede to the general principal of law that the agent of a disclosed principal incurs no personal liberty the exceptions to this rule has firmly caught the 2nd Defendant/Applicant in its waib. He cited in support the cases of WEST AFRICAN SHIPPING AGENCY (NIGERIA) LTD VS KALLA (1978) LPELR-3477 (SC) ; SKITH-BIRD VS BLOWER (1939) 2 ALLER 406 AND BASWA VS MEEKES (1950) AC 44.

In another submission counsel referred the court to paragraph 6 of the 2nd Defendant/Applicant supporting Affidavit and Exhibit vi and stated that it was never filed before any court. Also referred to is deposition in paragraph 4 (e) of the Claimant/Respondent's supporting Affidavit wherein the counsel stated that the 2 defendant further made payment of 6,100 Euros out of other outstanding indebtedness to the Claimant/Applicant but refused to offset the other wage payment which is the reason why the Claimant/Respondent is in court.

Finally on issue one, counsel referred the court again to Exhibit vi and submitted that there is nothing inheriting the Claimant/Respondent where she later found grounds like in this instant suit to sue the 2nd defendant/applicant. Consequently. Counsel urged the court to discountenance the argument of the 2nd Defendant/Applicant and resolve issue one in favour of the Claimant/Respondent.

On issue two, counsel submitted that the deposition by one Ugye Daniel Mathew in the supporting Affidavit of the 2nd Defendant/Applicant application should be discountenanced and refused as it negative the provisions of Section 117 of the Act, 2011 as Amended.

The learned counsel urged the court to take a work at the office addresses of the Learned Silk on the processes before the court and that of the deponent, court will discover that they are one and the same and which the counsel submitted that it contravene the provision of Section 117 of the Evidence Act

(Supra). That what is required of the deponent is his residential address and not any other address.

Therefore, counsel submitted moreso that the provisions of the law are merit to the strictly followed and complied with and urged the court to hold that the failure of the 2nd Defendant/Applicant to comply strictly with the provisions of the law is not a mere irregularity, but an illegality. Reliance was placed on the cases of UGBOJI VS STATE (2017) LPELR-43427 (SC); SANMABO VS THE STATE (1967) NWLR 314 at 317; SALAMI OLONJE VS I.G.P (1955-56) WRNLR 1; AMOKEODO VS I.G.P (1999) 6 NWLR (PT 607) 467; THE STATE VS GWONTO (1982) NSCC 104.

To this end, counsel urged the court to discountenance the purported supporting affidavit of 2nd Defendant/Applicant for not only failing to comply with the struck of the law but for being illegal. As such counsel urged the court to resolve the two issue in favour of the Claimant/Respondent.

Finally, counsel prayed the Court to dismiss the Application of the 2nd Defendant/Applicant with having lacking of merit and been brought in bad faith.

The Applicant file a further affidavit of 6 paragraphs deposed to by one Daniel Ugye, a litigation clerk at Templars, the firm of legal practitioners of applicant in this suit. Attached to the further affidavit are annexture marked as Exhibit V2. Also filed in support is a written reply on point of law dated 27th day of January, 2020.

In his reply on points of law counsel referred the court to paragraphs 4 (a) and (e) of the Respondent's Counter Affidavit and paragraph 3.1 of its written address and stated that the Respondent has always acted for and on behalf of the 1st Defendant/Respondent in connection with the contractual relationship between the 1st Defendant and the Respondent

On the Respondent action that the Applicant "has held itself out by its conduct to be one and the same with the 1st Defendant/Applicant," counsel referred the court to Section 338 of the Companies and allied matters Act 2004 on the concept of corporate legal personality and submitted that the

Respondents condition is unfounded in law and urged the court to so hold. Reliance was placed on BULET INT'L (NIG) LTD & ANOR VS OLANYI & ANOR (2017) LPELR-42475 (SC).

In his further reply on point of law, counsel states that the correct principle of law that applies is the one of "agency by stopped," to the effect that the 1st Defendant/Respondent who has by its conduct allowed the Applicant to represent itself as having its authority to deal with the Respondent will be liable to the Respondent for the acts of the Applicant. He cited in support the cases of TRENCO VS AFRICA REAL ESTATE & INVSTMENT CO. LTD ANOR (1978) 9 at 26 SC; LEVENTIS TECHNICAL LIMITED VS PETROJESSICA ENTERPRISES LIMITED (1999)6 NWLR (PT.605) 45; RSUST VS SKEZIE (2019) LPELR-46460 (CA).

On the Respondent's contention that the Applicant's Affidavit offends the provisions of the Evidenced Act, counsel submitted inter alia that the deponent resides at the said address, No. 6 Usuma Close Off Gana Street Maitama, Abuja, as the said address houses an office building and a residential apartment annex for staff.

Consequently, counsel urged the court to discountenance the contract of the Respondent as same is baseless and lacking substance or proof.

Finally, counsel urged the court to grant all the relief of the Applicant.

I have carefully perused the motion on notice, the reliefs sought the supporting affidavit and the annextures attached therewith together with the written address in support. I have equally gone through the counter Affidavit in opposition to the motion and the written address in support of the counter affidavit. Finally, I have given due consideration to the applicant's further affidavit, the Exhibits attached and the written reply on points of law.

Having done all these, it is therefore any humble view that the issues for determination is whether the applicant herein has made out a case for the grant of this application.

It is important to note at the onset that the parties to the contractual agreement that led to this suit are clearly stated in the contract agreement attached to the originating processes. For clearity, I shall reproduce however. It reads thus:-

CONTRACT AGREEMENT FOR 10 MW KATSINA WIND FARM PROJECT.

BETWEEN

VERGNET WIND ENERGY LIMITED (EMPLOYER)

AND CROWN RESOURCES DEVELOPMENT CO. LTD (CREDCO)

(CONTRACTOR)

PROJECT:- CONSTRUCTION OF 2X7.5 MVA KATSINA 10MW WIND FARM LIYAFA SUBSTATION IN KATSINA STATE NIGERIA.

From the above, the parties to the contract agreement was well speak out. No ubiquity as to who are the parties. In this regard , the law is settled that where the words of a document are clear and unambiguous they must be given effect. In support of this, see the case of OKOE=TIE EBOH VS MANAGER (2005) 2 MJSC where the Supreme Court held thus:-

"Where the ordinary plain meanings of words used in a statute are very clear and unambiguous effect must be given to those words without resorting to any intrinsic or external aid:.

Moreso, it is settled law that it is only the parties to the contract tht are bound by the terms of same. In this respect see the case of ARTRA IND. LTD VS N. B. C. I (1997) 1 NWLR (PT. 483) 593, paragraph F where it was held thus:-

"Parties are bound by the agreement they willingly enter into. The only juncture of the court is to enter prate the agreement in enforceable terms without more party who sings an agreement is bound by it.."

However it is the contention of the Claimant/Respondent as deposed in its Counter-Affidavit particularly paragraph 4 (a) & (b) thus:-

Paragraph 4 (a) reads thus:-

"That the 2nd Defendant/Applicant has always received, replied and made payments for the 1st Defendant/Respondent in the contractual relationship with the Claimant/Respondent."

Paragraph 4 (b) reads thus:-

"That the 2nd Defendant/Applicant has always held itself out as one and the same with the 1st Defendant/Applicant"

It is apparent from the quoted paragraphs above that the applicant acted for the 1st defendant/respondent in relation to the contract agreement with the Claimant/Respondent.

At this juncture, the question that comes to mind is, is the 2nd Defendant/Applicant a necessary party to be joined in this suit?

Before I proceed, it should be pointed out here that the applicant is neither a party to the contract agreement referred above nor is his name mentioned anywhere in the contract agreement.

Having said this, I will now proceed. It is trite law that a necessary party is one whose presence is necessary for the effectual and complete determinations of the suit. To put it in other words, a necessary party is a person whose above the issue in the suit can not be decided or determined. In this regard, I refer to the case of OLAWUYI VS ADEYEMI (19990 4 NWLR (PT. 147) 746 at 772, paragraphs A-B where court of Appeal held thus:-

"That allied mean that on the consideration of a clause in common law form contract, many parties would claim to be head. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled. There must be a question in the action which cannot be effectually and completely settled unless he is a party"

See also the case of GREEN VS GREEN (1987) 3 NWLR (PT. 61) 480.

In the circumstances therefore, having thoroughly gone through the processes filed in this suit before this Honourable Court it is my considered opinion that the 2nd defendant/applicant is not a necessary party in this suit because as pointed out earlier is not a party to the contract agreement that led to this suit. In other words, his presence is not necessary for the issues in this suit to be effectually and completely determined. I so hold.

Furthermore, I refer to the case of BELLO VS I.N.E.C (2010)8 NWLR (PT. 1196) 342 at 416-417 paragraphs H-B where Supreme Court held that:-

> ***"….It is the prerogative of the plaintiff to determine the determine in a suit. The liability of each of the parties in the suit would be determine having regards to the pleadings and evidence led by the claimant in the light of the applicable laws. Therefore in order to determine whether a party is a proper defendant to a suit, all the court needs to do is to exocrine the claim of the plaintiff before the Court. It is the plaintiff's claim that gives him the right to initiate the action fro the alleged wrongful act.."***

See also the case of DANTATA VS MUHAMMED (2007) 7 NWLR (PT. 664) 176.

Without calling into the substantive suit but for the purposes of emphasis, a careful look at the claims of the Claimant/Respondent before the court which was brought under the undefended list and the supporting affidavit particularly at paragraph 5 thus:-

> ***"The 2nd defendant is the parent company as well as the leading shareholder of the 1st Defendant and all correspondence and payment (Euro) for Jobs done, were made by the 2nd Defendant on behalf of the 1st Defendant. Attached and marked as Exhibit 45A1 is the documents of in co-poration (CAC C02) of the 1st Defendant."***

It shows that the 2nd defendant/Applicant is at best an agent of the 1st Defendant/Applicant. In this regard, see the case of YULCAN VS GGESELISHAFI (2001) 4 MJSC page.153at page.166 where the Supreme Court held that:-

"agency exists between two persons when one person ……..on impliedly consents that the other should out on his belief so as to affect his relationship with third parties and other persons similarly consents to so act.

See also the case of OLUFOSOYE VS FAKOREDE (1993) 1 NWLR (PT. 272) 747.

Without further ado, I align myself with the submission of learned counsel to the applicant where he rightly submitted that an agent be sued for the actions it taken on its principle's behalf because the actions are deemed in law that of the principal. See the case of SAMUEL OSIGNE VS PLPLS MANAGEMENT CONSORTIUM LTD & ORS (Supra).

In condition I equally align myself with the submission of the learned counsel to the Applicant in his reply on points of law to the submission of the learned counsel to the Claimant/Respondent that the Applicant's supporting Affidavits oftenest Section 177 of the Evidence Act, 2011 (as amended). To that extent, I hereby discountenance the said submission of the learned counsel to the Claimant/Respondent and hold that the supporting affidavit of the Applicant is proper and in line with the provision of the Evidence Act, 2011 (as Amended).

To this end, I hereby hold that striking out the name of the 2nd Defendant/Applicant as prayed will in my humble opinion not defeat the cause of justice in this suit. Consequently, I hereby resolve the issue for determination in favour of the Applicant against the Claimant/Respondent.

In view of the above, this application has merit as the name of the 2nd defendant/applicant be and is hereby struck out from this suit.

Signed

HON. JUSTICE SAMIRAH UMAR BATURE.

18/06/2020.