IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT GUDU - ABUJA

ON THURSDAY THE 20TH DAY OF OCTOBER, 2020.

BEFORE HIS LORDSHIP ; HON. JUSTICE MODUPE OSHO -ADEBIYI

SUIT NO. CV/1035/2020

PIETRO UZOCHUKWU MACELO ----------CLAIMANT/RESPONDENT

AND

1. R/ADMIRAL AYODELE ODEJIMI (RTD)
2. OLANIYI OYINLOYE Esq.---------- DEFENDANTS/APPLICANTS

RULING

The defendants by a Preliminary objection filed 16/3/2020 raised objection to the competence of this suit, praying for the following:

i. AN ORDER of this honourable court striking out the name of the 2nd defendant as a party to the suit being an agent of a disclosed principal.

ii. An order of court striking out this suit in its entirety for lack of jurisdiction in that the service of the court processes on the 1st defendant is defective.

Application was made on the following grounds:

1. That the proper parties are not before the court as the 2nd defendant is not a necessary party to this suit.

2. That the service of the court processes on the 1st defendant is defective and therefore cannot invoke the jurisdiction of this honourable court.

In support of the preliminary objection is a six (6) paragraph affidavit deposed to by Olaniyi Oyinloye the 2nd defendant and a written address. Annexed to the application is a letter address to the 2nd Defendant by the 1st Defendant titled "Letter of instruction to manage property" dated 2nd May, 2017 and tagged "ANNEXURE A". The Applicant also filed a six (6) paragraph further and better affidavit in support of the preliminary objection and attached to it is a reply on points of law to the Respondent's written address dated 18th march, 2020. Counsel did not raise any issue for determination in the written address but rather addressed the court on the two (2) grounds of objection raised above. In summary, learned counsel submitted that an agent to a disclosed principal cannot be sued along with the known principal and he is therefore not a necessary party to the suit. Counsel relied on the cases of **SAMUEL OSIGWE V. PSPLS MANAGEMENT CONSORTIUM LTD & ORS (2009) 3 NWLR (PT. 1128) 378 SC; CARLEN (NIG) LTD V. UNIVERSITY OF JOS (19940 1 NWLR (PT. 323) 631; KHOLAM V. JOHN (1939) 15 NLR 12; S.T.I.L V. MFCT (2007) 11 WRN 155 RATIO 13.** Counsel further submitted that service of the originating process has been held to be a condition precedent to the exercise of jurisdiction by the Court out of whose registry the originating process was issued. Counsel cited **ALHAJI ABUDULKADIR ABACHA V. KURASTIC NIGERIA LTD (2014) LPELR-22703 (CA); WESTERN STEEL WORKS LTD V. IRON & STEEL WORKERS UNION (2004) 7 WRN 58, (1986) 3 NWLR (PT. 30) 617; N. B. N. LTD V. GUTHRINE (NIG) LTD**

(1993) 4 SCNJ 1 AT 17. Learned counsel urged the court to dismiss/strike out this suit against the defendants as it is frivolous, vexatious and lacking in merit. On the reply on points of law, Counsel submitted that the issue of demurrer as raised by Plaintiff counsel in his counter affidavit is inapplicable here as the objection is hinged on the jurisdiction of the court. Counsel also submitted that the 2nd Defendant is not a necessary or proper party to the suit and as such his name should be struck off. Finally, counsel submitted that the 1st Defendant has not been properly served with the originating process in this suit as he does not reside within the jurisdiction of the Honourable Court as 1st Defendant was served by pasting in front of his solicitor's office. The said solicitor is the 2nd Defendant.

In opposition to the application, the Claimant/Respondent filed a sixteen (16) paragraph counter affidavit in response to the affidavit in support of the preliminary objection and a written address. Attached is a tenancy agreement between Rear Admiral Ayodele Odejimi (Rtd) (the 1st Defendant) and_Pietro Uzo Macelo (the Claimant). In the adopted written address, learned Counsel to the Claimant/Respondent, raised two (2) issues for determination to wit:

i. Whether the defendants' application is competent before the court

ii. Whether this court has jurisdiction to entertain this suit vis a vis the proper parties before the court and service duly effected.

Learned Counsel for the Claimant/Respondent submitted that the defendants' notice of preliminary objection is incompetent same having been filed in contradiction to the extant rules of court, as the defendants

has failed to file any pleading/defence demurrer having been abolished. Counsel Cited **Order 23 Rule 1 & 2 (1) of the FCT High Court Civil Procedure Rules 2018 and the case of C.C.B. (NIG) V. A.G. ANAMBRA STATE (1992) 8 NWLR PT. 261 PG 528 @ 556 PARA G.** Counsel further submitted that proper parties are before the court and the service of originating process duly effected in law on the parties. Counsel also submitted that the 1st Defendant was properly served with the originating process as the relevant documents to look at to determine if the 1st Defendant was properly served with the court papers are the contract document which is the Tenancy agreement and the writ of summons. Learned counsel cited and relied on case law in support of his submissions. Counsel urged the court to dismiss this application with substantive cost as same lacking in merit and a ploy to delay the timeous hearing of this case.

The issues for determination are;

1. Whether service of processes on the 1st Defendant is defective having served 1st Defendant through the office of his solicitor?

2. Whether the name of the 2nd Defendant can be struck out on the grounds that 2nd Defendant has a disclosed principal who is the 1st Defendant.

Defendants/Applicants in this case has raised the issue of non-service of court processes on the1st Defendant. The failure to serve an originating process is not a technical rule that can be brushed aside neither can it be explained away using **Order 23 Rule 1 & 2 (1) of the Rules of this Honourable Court** as a shield. The said order states that No demurrer

shall be allowed. In demurrer proceedings Preliminary Objection can be taken after the statement of claim but before the defence is filed see **TOGA GREEN FARMS AGRIC (NIG) LTD V. MITSUI O. S. K. LTD (2005) 17 NWLR (PT. 953) 70 @ 83-84, Para H-D Per Garba JCA.** Although Defendants/Applicants in this suit is yet to file a defence, a challenge to the jurisdiction of a court is not a demurrer as it is the general rule of practice that issues of jurisdiction can be raised at any stage of the proceedings even on appeal. See **ARJAY LTD V. APRLINE MANAGEMENT SUPPORT LTD (2003) 7 NWLR (Pt. 820) Pg 577 @ 602, Para H to Page 603 Per Onu JSC** where the learned Jurist held that the issue of jurisdiction is not a matter of Demurrer proceedings hence the defendant does not therefore need to plead first in order to raise the issue of jurisdiction.

It has been established that the failure to serve a writ of summons on a defendant is a fundamental issue which goes to the root of jurisdiction of a court as the service of originating processes is a condition precedent to the exercise of jurisdiction by the court. The object of service of processes, whether personal or substituted is to give notice to the other party on whom service is to be effected so that he might be aware of and able to resist if he may that which is sought against him.

In this suit 2nd Defendant/Applicant in his affidavit is claiming that 1st Defendant was served via substituted means by pasting the originating processes of this suit at the office door post of the 2nd Defendant who is a legal practitioner and agent of the 1st Defendant. Without much ado, a cursory glance at the Tenancy Agreement duly executed by both the 1st Defendant and the Claimant states the address of the 1st Defendant as "c/o

his solicitor and Agent Olaniyi Oyinloye Esq. of Niyi Oyinloye & Co, Legal Practitiners, Suite 206, Gerachi Plaza, Opposite Port Office, Wuse Zone 3, FCT Abuja". It is trite law that parties are bound by their agreement, hence where the words of an agreement are clear and unambiguous; the operative words in it should be given their simple and ordinary grammatical meaning. The court is not at liberty to legally or properly read into an agreement the terms on which parties have not agreed. 1st Defendant for reasons best known to him in the tenancy agreement has the address of his solicitor's office as his address. Consequently, for the purpose of this Tenancy the address of the solicitor's office must be construed as the address of the 1st Defendant and that address is binding on the Defendant/Applicant. 2nd Defendant/Applicant relied on address in annexure A which is a letter of instruction to manage the said property. The said letter of instruction was addressed to 2nd Defendant duly signed by the 1st Defendant. I have read annexure A and it is a letter of instruction written by the 1st Defendant and addressed to his solicitor the 2nd Defendant. The said annexure A has a completely different address compared to the Tenancy Agreement. It is not rocket science that a letter (as in this case the letter of instruction) addressed to a particular individual (2nd Defendant) is a private letter and written strictly for the consumption of the addressee being the 2nd Defendant. It is therefore a spurious and erroneous defence for the 2nd Defendant to put forward the address contained in a letter of instruction strictly addressed to him as the address where originating processes ought to have been served on the 1st Defendant. Unfortunately extrinsic evidence cannot be used to vary terms of an agreement see **LARMIE V. DPM & SERVICES LTD (2005) 18 NWLR**

(Pt. 958) Pg. 88 SC @ Pg. 459 Para. Per Tobi JSC Pg 467 Para E per Tobi JSC; Pg 476-477 Para H-C Per MOHAMMED JSC where the learned Jurist held that it is not the duty of the court to make an agreement/contract for the parties before it or to re-write one already made by them. Parties are bound by their agreement. Where parties have embodied the terms of their contract in a written agreement, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instruction.

Hence where there is any disagreement between parties to a written agreement or any particular point, the authoritative and legal source of information for the purpose of resolving that disagreement or dispute is the written contract/agreement executed by both parties and I therefore hold that the address of the solicitor's office being the address of the 1st Defendant as provided in the Tenancy agreement is a proper address for service of originating process and I further hold that service on the 1st Defendant through the office of his solicitor is proper service.

On the 2nd issue that 2nd Defendant is not a necessary party to this suit as the 2nd Defendant is an agent of a disclosed principal being the 1st Defendant. It is trite that an agent of a disclosed principal binds the principal and cannot be sued as acts done by the agent are deemed to be by and on behalf of the principal. In the statement of claim paragraph 22 states:-

> *"The Claimant avers that he also took steps to report the matter to the police in the area in other to avoid denial of the incident by the Defendants, the police went and arrested the workmen who later*

reveal that the 2nd Defendant sent them and are bent on carrying out the instructions of their master. The 2nd Defendant has also volunteered statement to the Police and picture taken for records"

That 2nd Defendant is a lawyer and agent of the 1st Defendant is unchallenged and uncontroverted. Claimant in his counter affidavit also stated in paragraph 5 that the act of removing his entire roof by the 2nd Defendant was an act of trespass and outside the 2nd Defendant's scope of duty as a lawyer. From the above, it will be impossible for this court to go into a fact finding mission on whether the 2nd Defendant acted on behalf of his principal or outside the scope of his duties without going into the facts of this matter viz-a-viz whether 2nd Defendant indeed instructed workmen to remove Claimants' roof. Also to get answers to the question whether 2nd Defendant acted within the scope of his authority or outside the scope of instructions given to him by the 1st Defendant who is his principal, would be impossible without leading evidence and the Supreme Court have long decided that where the courts cannot decide a preliminary objection without evidence being led, it ceases to be a preliminary objection. See **ELEBANJO V. DAWODU (2006) 15 NWLR (Pt. 1001) 76 @ 137 Para E-F where Ogbuagu JSC** held that once issues cannot be determined on the pleadings then the court ought to proceed to a full trial of the case and decide the point afterword. A preliminary point ceases to be one strictly speaking once the point could not be decided without evidence being led. In such a case, the point becomes a defence to the action.

From the peculiar circumstances of this case, the issue whether 2nd Defendant is a necessary party to be sued or not is not one that can be determined at this preliminary stage as it will amount to taking issues of

the substantive suit at a preliminary stage, in essence it would remove the substance at a preliminary stage which would ultimately defeat the course of justice. In the circumstance Notice of preliminary objection dated 10/03/2020 and filed 16/03/20s20 is consequently struck out. Case is hereby set down for hearing. Cost in the sum of N50,000.00 (Fifty Thousand Naira) only is hereby issued in favour of the Claimant.

Parties: Absent

Appearances: D. T. Nwachukwu for the Claimant. Defendants not represented.

HON. JUSTICE M. OSHO-ADEBIYI

JUDGE

20TH OCTOBER, 2020