

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**IN THE NYANYA JUDICIAL DIVISION**  
**HOLDEN AT COURT 7, NYANYA ON THE 19<sup>TH</sup> DAY OF**  
**JANUARY,2021**  
**BEFORE HIS LORDSHIP, HON. JUSTICE U. P. KEKEMEKE**

**SUIT NO. FCT/HC/CV/2388/18.**

**COURT CLERK: JOSEPH BALAMI ISHAKU.**

**BETWEEN:**

**PESTHER BRANDS LIMITED .....CLAIMANT**

**AND**

**NIGERIAN NATIONAL PETROLEUM**

**CORPORATION (NNPC)..... DEFENDANT**

**RULING**

The Defendant Notice of Preliminary Objection dated the 4<sup>th</sup> day of November 2019 but filed on the 7<sup>th</sup> is for the following.

1. An Order of Court dismissing the Claimant's Claim for being an abuse of Court process lack of jurisdiction and competence.
2. And for such other orders or further orders as the Court may deem fit to make in the circumstance.

Learned Counsel to the Defendant relied on the grounds for the application:

They are:

1. The suit of the Claimant is res judicata having been litigated upon by another Court and judgment

obtained hence caught by the principle of Estoppel per rem judicatam

2. That the suit is statute barred having been instituted after 3 months from the accrual of the cause of action prescribed by the Public Officers Protection Act.
3. That the Claimant lacks the locus standi to institute the action against the Defendant.

Learned Counsel rely on the 3 paragraph Affidavit filed in support of the application deposed to by Imaobong Essien.

She deposes essentially that sometime in June 2017 the First Bank instituted an action against the Claimant and the Defendant in this Court by way of the undefended list procedure.

That all parties were duly represented wherein both this Claimant and the Defendant filed their Notice of Intention to defend.

That the claim of the First Bank is that the Defendant in this suit failed to pay to her the balance of contract sum domiciled to her by the Contractor i.e. the current Claimant who executed the contract of rebranding of the NNPC affiliated stations.

The Defendant herein had since appealed against the judgment of the Court at the Court of Appeal, Abuja and same has been entered.

That the First Bank had obtained a Garnishee Order Absolute against the Applicant (NNPC) being the current Defendant.

That the Claimant in the earlier case (First Bank) filed the suit as a privy/agent to the current Claimant by virtue of the transfer of assignment and rights of the current Claimant to it in relation to the subject matter.

That the earlier suit is premised on the same contract agreement as in the instant case.

The Claimant was represented in the earlier suit. The photocopy of the record of appeal is attached and marked Exhibit NNPC 001.

The current suit is an exposure of the Defendant to unwarranted double jeopardy and gross abuse of Court process. That this suit is vexatious, annoying and it constitutes a flagrant abuse of process of Court and due administration of justice.

That the Claimant's action was not filed in Court until the 20<sup>th</sup> day of July 2018.

That Defendant is a public servant and enjoys the protection of the Public Officers Protection Act. That the claim of the Claimant bothering on a purported outstanding balance arising from the said contract became due upon submission of her final invoice dated 30/11/2010.

That the Claimant's claim was filed seven years when the cause of action arose.

That Claimant had irrevocably in writing, donated her right to whatever monies payable to it on the said rebranding contract and her right to sue on same to First Bank of Nigeria and are estopped from suing the Defendant concerning same in their personal capacity.

That the First Bank has in pursuance of the right to sue instituted action and obtained judgment against the Defendant. That the Claimant herein no longer has any locus standi.

The Claimant filed a counter Affidavit in opposition to the Notice of Objection. Learned Counsel to the Claimant rely on the 33 paragraph counter Affidavit sworn to by Mike Nnonye Okpor. He deposes essentially that the claim of First Bank in suit CV/2320/17 against the Claimant and the Defendant in this suit not for balance of contract sum

but balance of the loan facility in the domiciliation transaction.

The loan domiciliation agreement is Exhibit PBL1.

That the contract sum is different from the loan facility granted the Claimant.

That this suit is for the payment of the balance of the sum outstanding in favour of the Claimant in the Claimant's contract of rebranding of Defendant's Filling Stations. The copy of the contract is Exhibit PBL2.

That the subject matter of this suit is not the same as the subject matter in suit CV/2320/17.

A copy of the Writ and Affidavit in support of the claim is Exhibit PBL3.

That the Claimant in suit No. CV/2320/17 which is First Bank Plc is only concerned and entitled to recovery of the loan facility it granted to the Claimant.

That the contract enforced in CV/2320/2017 is not the same as the contract in this suit. The Claimant was represented in suit CV/2320/17 by the same Counsel.

That the suit of the Defendant is not abuse of Court process. This suit is not a relitigation of any suit between the parties.

That suit CV/2330/17 did not decide the right of the Claimant in its contract with the Defendant. A copy of the Judgment is Exhibit PBL4.

That Claimant wrote another letter dated 3/05/17. A copy of the said letter is Exhibit PBL5.

That the suit is not statute barred.

That the right given to the 1<sup>st</sup> Bank by the Claimant in the domiciliation agreement is that the bank collects the sum of the loan and the interest thereon from the payment due to the Claimant on the Claimant's contract with the Defendant and not the entire contract sum.

The first Bank has a right to sue on its loan facility which it did in Suit No. CV/2320/17.

That Claimant has a right to recover the outstanding on the contract between the Claimant and the Defendant.

That it is in the interest of justice to refuse the application.

Parties filed and adopted their written addresses

The Defendants/Applicants' Written Address which he adopted is dated 4/11/19.

He canvassed that this suit is statute barred having not been instituted within 3 months of accrual of the right of action or within 6 years when the cause of action arose.

That the Defendant is a public officer by all intent and purpose. That the Claimant's cause of action lapsed on 25/02/11. That Claimant did not file any action until 20/07/18 well over 7 years after the accrual of the cause of action.

The Defendant's Counsel further submits that this Suit is res judicata and therefore caught up squarely by the principle of Estoppel Per Rem Judicata. The subject matter of the suit had been subject of litigation in this Court. That Defendant has satisfied the conditions for the defence of Estoppel Per Rem Judicata.

That the issues are the same. That Claimant and Defendant are parties in the earlier case. The subject matter is also the same. A successful plea of res judicata deprived the Court of jurisdiction. It is the submission of Learned Defendant's Counsel that the present case is a flagrant abuse of Court process. He urges the Court to dismiss the suit.

On whether the Claimant who had domiciled its right to the contractual sum under the said contract with the Defendant to First Bank can now turn round to sue the same Defendant for any outstanding payments. Learned Counsel to the Defendant/Applicant canvassed that the Claimant had contracted its right to all benefits in the said contract to

a 3<sup>rd</sup> Party which is First Bank. The Claimant had donated her right to sue to the First Bank. He finally urges the Court to dismiss the suit.

The Claimants Written Address is dated 23/12/19. Learned Counsel to the Claimant adopted same as his address in opposition to the Notice of objection.

Learned Counsel argues that the suit is not statute barred either by provision of the Public Officers Protection Act or the Statute of General Limitation six year window.

That the suit is founded in contract. That the provisions of Section 2(a) of the Public Officers Protection Act does not apply to contract.

That Claimant wrote a letter of demand on 30/06/11 served same on the Defendant on the 3/07/11. That 6 years is to expire on 3/07/17. That this Suit was instituted on 3/05/17.

That this suit was filed within six years period.

Learned Counsel further submits that this case is not caught up with the doctrine of Res Judicata.

That the suit of the Claimant as constituted before this Court has not been litigated upon hence it is not caught by the doctrine of Res Judicata. That the parties are not the same. The dispute in Suit No. CV/2320/17 is on the



payment of outstanding loan facility granted the 2<sup>nd</sup> Defendant and the failure of the 1<sup>st</sup> Defendant to pay the said sum through the domiciled account of the Claimant.

The subject matter of this Suit and the earlier suit are not the same. The judgment in the earlier suit never considered the issue of the outstanding payments in favour of the Claimant.

That the Claim and Judgment were not conclusive of the rights of parties. That the right of the Claimant and the Defendant and issues in the matter of branding contract have not been determined.

Learned Claimants' Counsel further submits that the suit is not an abuse of Court process.

That there has never been any suit between the Claimant and the Defendant over the subject matter and issue.

That the Claimant has locus standi to institute this action. That there is a dispute between the Claimant and the Defendant. That Claimant has outstanding payment in its contract with the Defendant.

That Claimant has sufficient interest in the matter which is adversely affected to his detriment.

Section 2 of the Public Officers Protection Act states:

***“Where any action, prosecution or other proceeding is commenced against any person for an act done in pursuance or execution or intended execution of any act or law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any Act, law duty or authority, the following provisions shall have effect:***

***(a) The action, prosecution or proceedings shall not be or be instituted unless it commenced within three months next after the act, neglect or default complained of or in case of a continuance of damage or injury within three months next after the ceasing thereof.”***

Where the statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. Thus an action instituted after the expiration of the prescribed period is said to be statute barred.

Section 2 of the Public Officers Protection Act does not apply to cases of contract, recovery of land, breaches of contract or claims for work or labour done.

See **OGUNKO VS. SHELLE (2004) 6 NWLR (PT.868) 17**

**OSUN STATE GOVT. VS. DALAMI NIG. LTD (2007) AFWLR (PT.365) 438.**

Time begins to run for the purposes of limitation law from the date the cause of action accrues.

See **JAIICO LTD VS. OWONIBOYS TECH. SERVO LTD (1995) 4 NWLR (PT.391) 534 at 538.**

The guide in the determination of whether or not a Court has jurisdiction is the subject matter of the Claim as endorsed in the Writ of Summons.

It is the claim of the Claimant that determines the jurisdiction of the Court which entertains the claim.

In determining whether or not an action is statute barred, the Court looks at the Writ of Summons and statement of Claim alleging the wrong which gives the Claimant a cause of action.

See **FORESTRY RESEARCH INSTITUTE OF NIGERIA VS. MR I.A ENAIFOGHE GOLD (2007) 11 NWLR (PT.1044) P1.**

This suit is dated 18<sup>th</sup> July 2018 but filed on the 20<sup>th</sup> day of July 2018.

It is for the following.

1. The sum of N26,361,507.07 being the sum outstanding and unpaid in favour of the Claimant by the Defendant from the contract for the branded 19 Defendant's Filling Stations.
2. The sum of N3,458,017.07 being the 5% of the contract sum held by the Defendant as retention fee on the contract executed by the Claimant etc.

From the foregoing, it is clear that it is a case of contract/breaches of contract and claims for work or labour done.

In the circumstance, the Public Officers protection Act does not apply and I so hold.

In respect of the statutes of general application, the cause of action accrue when the Defendant failed, refused or neglected to pay the accrued sum after the expiry of the letter of demand.

This suit was therefore filed within 6 years of the accrual of the cause of action.

In totality, the issue is resolved in favour of the Claimant against the Defendant.

The simple meaning of Res Judicata and the conditions for its application are vividly explained by **TOBI JSC in ABUBAKAR VS. B.O & AP LTD (2007) 18 NWLR (PT.1066) 319 at 373** as **“a thing adjudicated”**.

A matter already adjudged. It refers to a case in which there has been a final judgment and is no longer subject to appeal. The essence of the doctrine is to bar or preclude continued litigation of such cases between the same parties.

***In DAGAG OF DERE & ORS. VS. DAGAG OF EBWA & ORS. (2006) LPELR 911 SC***, the Supreme Court held Per Oguntade JSC thus ***“... It is well known that before this doctrine can operate, it must be shown that the parties, issues and subject matter were the same in the previous case as those in the action in which the plea of res judicata is raised.”***

The earlier suit is dated 30/06/17 and filed on the same date. It is between First Bank of Nigeria as Claimant and the Claimant and the 1<sup>st</sup> Defendant herein as Defendants.

The claim against the Defendant is for the sum of N18,011,254.30K as at 27/07/2016 being the unpaid debit balance in the 2<sup>nd</sup> Defendant's account with the plaintiff arising from the failure of the 1<sup>st</sup> Defendant

refusal, failure or negligent to domicile the full proceeds of the LPO Contract.

2. The agreed interest rate of 22% per annum of the above sum from 28/07/16 till Judgment is delivered.
3. Post Judgment interest of 10% per annum until final liquidation.

I have also read the Affidavit in support of the Writ of Summons and the attached Exhibits.

The final judgment in the earlier case is on page 77 – 93 of the record of appeal attached to this application.

The Notice of Appeal is also attached to the records of appeal.

The present suit is between the 2<sup>nd</sup> Defendant in the earlier suit 2<sup>nd</sup> Defendant in the earlier suit as Claimant and the 1<sup>st</sup> Defendant in the earlier suit as Defendant.

It claims N26,316,507.07 being the sum outstanding and unpaid in favour of the Claimant by the Defendant from the contract for the rebranded 19 Defendants' Filling Stations.

3. The sum of N3,458,017.07 being sum held by the Defendant as retention fee on the contract etc.

In my view, the parties in this case are involved in the earlier case which is on appeal.

The subject matter is the rebranding contract agreement which sum was agreed to be paid into the account of the Claimant with First Bank of Nigeria.

The First Bank has a loan agreement with the Claimant which culminated into the Claimant overdrawing his account to service the contract.

The subject matter in the earlier case is part of the subject matter in the present case.

The issues are also the same.

The present Claimant and Defendant had all the opportunity to present their cases before the Court.

The case is not done, it is on appeal.

Parties to a case and their Counsel have a duty to be clean, pure and honest in approaching the Court to ventilate their grievances. It behooves on parties to be straight forward.

Litigation is not a game of chess. Parties must honour their agreement, 'no evil way out'.

In my view, the Defendant has satisfied the conditions for the application of Estoppel Per Rem Judicata in this case.

The Claimant is therefore Estopped from bringing this action and I so hold.

This issue is resolved in favour of the Defendant against the Claimant.

In the circumstance of this case, the present suit is an abuse of Court process, the cause of action having expired by reason of the final Judgment in the other Court.

In totality, I hold that the Preliminary Objection succeeds.

This suit is therefore dismissed.

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**Hon. JUSTICE U.P. KEKEMEKE**

**(HON. JUDGE)**

**19/01/21.**



PARTIES ABSENT.

CHIJOKE KANU FOR THE CLAIMANT.

**COURT:** Ruling delivered.

Signed.

Hon. Judge.

19/01/21.