

**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 SAMIRAH UMAR BATURE**

**COURT CLERKS: JAMILA OMEKE & ORS**

**COURT NUMBER: HIGH COURT NO. 32**

**CASE NUMBER: SUIT NO: FCT/HC/CV/3053/2020**

**MOTION NO: M/11859/2020**

**DATE: 11<sup>th</sup> MARCH, 2021**

**BETWEEN:**

1. CYREX ENERGY LIMITED  
2. CYREX NIGERIA BARGE LTD
- } .....PLAINTIFFS/RESPONDENTS

**AND**

1. FEDERAL GOVERNMENT OF NIGERIA  
2. HON. ATTORNEY GENERAL OF THE FEDERATION  
3. CENTRAL BANK OF NIGEERIA  
4. NIGERIA ELECTRICITY REGULATORY COMISSION  
5. NIGERIA BULK ELECTRICITY TRADING  
COMPANY LTD
- } DEFENDANTS

## RULING

By a Notice of Preliminary Objection brought pursuant to section 5 of the Arbitration and Conciliation Act 2020, dated 23<sup>rd</sup> day of November 2020 and filed the 24th day of November 2020.

The 3<sup>rd</sup> Defendant herein prayed this honorable court for the following orders.

1. **AN ORDER** of this Honorable Court striking out this suit for lack of jurisdiction.
  
2. **AN FOR SUIT FURTHER ORDER(S)** this Honorable Court may make in the circumstances of this case.

The grounds for which this Preliminary Objection was brought are as follows:

- a. The power purchase agreement executed between the parties contains an Arbitration Clause and as such, recourse to Arbitration is a condition precedent required to be fulfilled before filing of this suit.
  
- b. The option of arbitration was not explored by the parties before the Claimants filed this matter before this honorable court.  
The arbitration agreement between the parties is valid and subsisting.

That the arbitration condition precedent not been fulfilled, this court is bound to strike out the proceedings until the parties make recourse to arbitration.

In support of the Preliminary Objection is a 3 paragraphed affidavit deposed to by one Justice Ebebulam, a litigation secretary in the chambers of the 3<sup>rd</sup> Defendant/Applicant's counsel's office. Attached to the affidavit is an annexure marked as Exhibit C1. Equally filed in

support of the Preliminary Objection is a written address dated 23<sup>rd</sup> day of November 2020. In the said written address, counsel raised two issues for determination, to wit;

- 1. Whether this court has the requisite jurisdiction to entertain this matter where a condition precedent has not been complied with by the Claimant before instituting this suit.**
- 2. Whether the Claimant is not precluded from instituting this action until they have complied with the condition precedent on arbitration as provided in clause 23.2 of the power purchase agreement.**

In arguing issue one, counsel submitted that, this suit is incompetent for failure of the claimant to fulfil the condition precedent of resorting to arbitration before instituting this action. Counsel placed reliance on the case of **MADUKOLUM V. NKEMDILIM (1962)2 SCNLR 341, WESTERN STEEL WORKS LTD V. IRON & STEEL WORKERS UNION (NO. 1) (1986) 3 NWLR (PT 50)617, EGUANWENSE V. AMAGHIZEMWEN (1993)9 NWLR (PT 315)1 @25**. He submitted moreso that, where there is a condition precedent to be fulfilled before the institution of an action and such condition is not fulfilled, the court is robbed of the jurisdiction to entertain same. It is the contention of the learned counsel to the Applicant that, having failed to fulfill the condition precedent, this honorable court lacks jurisdiction to entertain the suit. In concluding issue one, counsel cited the cases of **UBA PLC & ORS V. ADEMOLA (2008) LPELR- 5066(CA), WEST AFRICAN EXAMINATION COUNCIL V. OMODOLAPO YEMISII ADEYANJU (2008) LPELR – 3467 (SC); OKOLO & ANOR V. UBN LTD (2004) LPELR – 2465 (SC)** and submitted that, the issue of jurisdiction is fundamental and it is the life wire of a case and where a court lacks jurisdiction to entertain a matter because it is incompetent,

the right order to do is to strike out the matter. Counsel urged the court to hold so.

In arguing issue two, counsel submitted that, it is a settled principle of the law that where parties have agreed to resolve their dispute by arbitration, the courts would strike out proceedings in such a matter and order parties to make recourse to the arbitration agreement entered in to by the parties. Reliance was placed on the cases of **BCC TROPICAL NIGERIA LTD V. THE GOVERNMENT OF YOBE STATE OF NIGERIA & ANOR (2011) LPELR- 9230 (CA) (P.13, PARAS D-F), SCOA (NIG)PLC V. STERLING BANK PLC AND LSWC V. SAKAMORI CONST. NIG LTD (2013) 12 NWLR (PT 1262) 569**. Finally, counsel urged the court to strike out this matter for want of jurisdiction.

On the other hand, in response to the 3<sup>rd</sup> Defendant's/Applicant's Preliminary Objection, the Plaintiff/ Respondent filed a written address dated 25<sup>th</sup> day of November 2020. The learned counsel to the plaintiff/respondent in response to the submission of the Defendant/Applicant's Counsel submitted that, it is only a party to an agreement that has the competency to raise and rely on the arbitration clause contained in the said agreement and that the 3<sup>rd</sup> Defendant/ Applicant is not a party to the said agreement and therefore, is incompetent to invoke the arbitration clause contained therein. On this note, counsel urged the court to dismiss the Preliminary Objection. Counsel referred the court to **SECTION 5(1) OF THE ARBITRATION AND CONCILIATION ACT** and the cases of **CHEVRON (NIG) KLTD & ANOR V. BRITTANIA –U (NIG) LTD & ORS (2018) LPELR 43819 (CA) AND AFRICAN INSURANCE DEVELOPMENT CORPORATION V. NLNG LTD (2000) LPELR 2020**.

Counsel further argued that, it is settled law that an agreement to submit dispute to arbitration does not oust the jurisdiction of the court, that assuming without conceding that the 3<sup>rd</sup> Defendant/Applicant was a third party to the agreement to enable him invoke the arbitral clause,

application for stay of proceedings pending arbitration will be the proper prayer to make and such prayer can only be granted at the discretion of the court. Reliance was placed on the cases of **BILL & BROTHERS LTD & ORS V. DANTATA & SAWOE CONSTRUCTION CO (NIG) LTD ORS (2015) LPELR 24770 (CA)**, **K.S.D.B V. FANS CONSTRUCTION LTD (SUPRA)**, **ONYEKWULUJE & ANOR V. BENUE STATE GOVERNMENT (2015) LPELR – 24780 (SC)**. In his further submission, counsel state that on the face of the originating processes filed before this honorable court and the various annexures therein, there is absolutely nothing to submit before the arbitration as the money due to the plaintiff is in custody of the 3<sup>rd</sup> Defendant/ Applicant who has continued to illegally detain the money without providing any explanation whatsoever. Finally, counsel urged the court to dismiss the preliminary objection and enter judgement in favor of the Plaintiff/ Respondent and grant all the reliefs contained in the writ of summons herein.

The 3<sup>rd</sup> Defendant/Applicant filed a reply on points of law dated the 27<sup>th</sup> of November 2020 and filed the 30<sup>th</sup> day of November 2020. In the said reply counsel submitted that they rely on the arguments canvassed in the notice of Preliminary Objection dated 24<sup>th</sup> of November 2020. Counsel also submitted that, the arbitration clause contained in the PPA is a condition precedent needed to be fulfilled before instituting this action and therefore a jurisdictional issue which can even be raised suo motu by this Honorable Court and urged the court hold so. While relying on the cases of **NONYE V. ANYICHIE & ORS (2005) LPELR -2061 (SC) @ PG 17 PARA G**, **MADUKOLU V. NKEMDILIM (SUPRA)**, counsel submitted that this suit is incompetent because the 3 Claimant/ Respondent has failed to fulfill the condition precedent and urged the court to order the fulfilment of the condition precedent by the Claimant/Respondent before assuming jurisdiction in this case.

In his further reply on points of law, counsel submitted that, assuming without conceding that the 3<sup>rd</sup> defendant is not entitled to enforce the

PPA not being a party to it, the Claimant/ Respondent cannot also validly maintain the claim against the 3<sup>rd</sup> Defendant since it is not privy to the PPA, that the doctrine of privity of contract affects only the parties to it and cannot be enforced by or against a person who is not privy to it. Reliance was placed on the cases of **IDUKUEFO V. PFIZER PRODUCTS LTD & ANOR (2014) LPELR 22999 (SC)**, **UBA PLC & ANOR V. JAGARBA (2017) LPELR – 3399 (SC) @ P 19 PARAS D-F** and prayed this honorable court to discountenance same.

On the whole, counsel urged the court to grant the 3<sup>rd</sup> Defendant/ Applicant's Preliminary Objection in its entirety and to discountenance the written address of the Claimant/Respondent as parties cannot by consent waive issue of jurisdiction or confer same on the court by their acquiescence.

I have carefully gone through the notice of Preliminary Objection, the reliefs sought, the supporting affidavit and the annexures attached together with the written address in support. I have equally gone through the Plaintiff's/ Respondent's written address in opposition to the preliminary objection and the reply of the Claimant's/Respondent's on points of law. Having done that, it is my humble view that the issue for determination is;

- 1. Whether this honorable court has jurisdiction to entertain this suit in view of the power purchase agreement between the parties.**

## **ISSUE ONE**

**Whether this honorable court has jurisdiction to entertain this suit in view of the power purchase agreement between the parties.**

It is germane to note at the onset that jurisdiction is the life wire of any adjudication. Where a court adjudicates upon a matter without

jurisdiction, the entire proceeding will be rendered a nullity however beautifully conducted. In other words, jurisdiction is fundamental to every proceeding.

In this respect, see the case of **OIL SERVICES LTD V OBONG SYLVESTER PETER UDOM & ORS (2013) LPELR – 20398(CA)** where the court held thus;

***“...jurisdiction in judicial proceedings is the authority and power that clothes a court with the legal ability and competence to adjudicate over a dispute between the parties that come before it...”***

Also, in the case of **MC INC LTD V. DUNCAN (2016) 4 NWLR PART 1501 @ P. 205, PARASF-G, Per NDUKWE – ANYANWU, JCA**, rightly held thus;

***“...the jurisdiction of court is fundamental to any proceedings, therefore, the court must first of all assume jurisdiction to determine whether it indeed has jurisdiction to adjudicate on a matter brought before it...”***

The crux of this Preliminary Objection is that the power purchase agreement executed by the parties contains a condition precedent; that is an arbitration clause which has not been first explored by the Plaintiff/Respondent before resorting to Court. Therefore, it is the contention of the 3<sup>rd</sup> Defendant/Applicant that this suit is incompetent. For the avoidance of doubt and easy understanding, I will reproduce the Clause 23.3 of the Power Purchase Agreement which is the arbitration clause, it reads thus;

***“The parties hereto agree that in the event that there is any dispute or claim or controversy between them arising out of or in connection with this agreement or in connection with the interpretation of any provisions hereof or its breach, termination or validity (a “dispute”) representative of the relevant parties (including, in the case of purchaser and owner the representative of purchaser and owner***

***appointed under clause 6) shall meet together within 5 days of one party notifying the relevant parties of a dispute in an effort to resolve such dispute by discussion between them but failing resolution of such dispute within a further five day period, the chief executive of owner send the chief executive or the designated representative thereof of purchaser, NEPA and/or the guarantor (as the case may be) shall then meet to resolve such dispute and the joint decision of such persons shall be set forth in a writing signed by each of them and thereafter shall be binding on upon the parties hereto; provided that in the event that a settlement of any of such dispute is not reached pursuant to this clause 23.2 within 30 days of one party notifying the other relevant parties of a dispute then either party shall have the right to have such dispute determined by arbitration in accordance with the provisions of this clause 23. Except for disputes resolved through negotiation, arbitration shall be the exclusive method of resolving disputes.”***

From the above, it is clear that parties to the power purchase agreement agreed that, dispute arising therefrom should be determined by arbitration. Therefore, it is trite law that arbitration clause stipulates a procedure under which parties may settle their disputes. On the bindness of an arbitration clause on parties as well as the court, I will refer to the case of **NEURAL PROPPRIETARY LTD V. UNIC INS. PLC (2016) 5 NWLR PT 1505 PG G-H.383 G-H 386 PARAS C-D** where the court held that;

**“...where parties have chosen or determined for themselves that they would refer any of their disputes to arbitration instead of resorting to regular courts. Aprima facie duty is cast upon the courts to act upon their agreement. The court must respect the arbitration clause the parties entered into voluntarily as included in their contract...”**

**See also the case of THE OWNERS OF THE M.V. LAPEX V NIGERIAN OVERSEAS CHATERING AND SHIPPING LTD (2003) LPELR – 3195 (SC);**

**OYO STATE GOVT. V. MOGOKE VENTURES (NIG) LTD (2015) LPELR – 41731 (CA)**

Based on the above, it is clear that the inclusion of an arbitration clause in a contract agreement makes it binding on parties to the agreement and as such, parties must comply to it. I so hold.

Before I proceed, let me quickly refer to the case of **FASTECH (NIG) LTD V. ZAMFARA STATE GOVT & ORS- 34 (2019) LPELR – 48135 (CA)**, where it was held that:

**"...In the first place it is a misconception of the law to argue that the mere presence of an arbitration clause in a contract, or agreement by parties to submit a dispute to arbitration, ousts the jurisdiction of the Court. That is not the true position of the law. Nay. The correct and proper position of the law is that an arbitration clause in an agreement generally, does not oust the jurisdiction of the Court or ipso facto preclude parties from having recourse to the Court. An arbitration clause is only a stop-gap process which should not generate heat of an ouster clause, nor should the choice of arbitration bar or exclude a resort to the Court. It only has the effect of staying the proceedings subject to the satisfaction of the necessary conditions..."**

See also the case of **CITY ENGINEERING NIG. LTD V. FEDERAL HOUSING AUTHORITY (1997) LPELR - 868 (SC)** where per Ogundare held thus;

**"...As well pointed out earlier, any agreement to submit a dispute to arbitration, such as the one referred to above, does not oust the jurisdiction of the court. Therefore, either party to such an agreement may before submission to arbitration or an award is made, commence legal proceedings in respect of any claim or cause of action included in the submission...."**

More so, section 5(1) of the Arbitration and Conciliation Act Cap A18, Laws of the Federation of Nigeria 2004 provides thus;

**“...if any party to an agreement commences any action in any court with respect to any matter which is subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering pleading or taking any other steps in the proceedings “apply” to the court to stay proceeding...”**

From the wordings of section 5(1) (supra) quoted above, it is clear that it is only a party to the arbitration agreement that can apply to the court for a stay of proceeding. The question that agitates itself at this juncture is, is the 3<sup>rd</sup> Respondent/Applicant a party to the power purchase agreement to cloth him with the right to raise the issue of arbitration clause in the aid agreement?

A close perusal of the annexure attached to the supporting affidavit marked as Exhibit Omaplex C1 will reveal and/or show clearly that the 3<sup>rd</sup> Defendant/Applicant is not a party to the said power purchase agreement. I so hold. On that note, it is trite law that only party to a contract can benefit therefrom. In other words, the law is settled that a contract cannot confer rights or impose obligation on persons who are strangers to it. In this respect, I refer to the case of **REBOLLD INDUSTRIES LTD V MAGREOLA & ORS (2015) LPELR – 24612 (SC)** where it was held that,

**“... I must state clearly that there is in the law of contract what is referred to as privity of contract it is always between the contracting parties who must stand or fall, benefit or lose from the provisions of their contract. That is to say their contract cannot bind third parties nor can third parties take or accept liabilities under it nor benefit there under...”**

See also the cases of **A.G OF THE FEDERATION V. AIC LTD (2002) 10 NWLR (PT 675) 293, INECO (NIG) LTD & CONTRUCTION CO LTD V. DUFAN (NIG) & ANOR (2019) LPELR – 47 211 (CA)**

Be that as it may, it is the submission of the learned counsel to the Claimant/Respondent that, it is only a party to an agreement that has the competency to raise and rely on the arbitration clause contained in the agreement. This submission of the learned Claimant/Respondent counsel appears to be the correct position of the law which was re-echoed in the case of **CHEVRON (NIG) LTD & ANOR V. BRITANIA - U (NIG) LTD & ORS (2018) LPELR –B43899 (CA)** that;

**“...and coming finally to the issue of whether the lower court should have referred the action to the arbitration, I agree with counsel to the 1<sup>st</sup> respondent that appellants who are not parties to the confidentiality agreement cannot properly ask for arbitration on it. That is a simple application of the principle that only parties to an agreement can enforce it. In any event, the confidentiality agreement and its arbitration clause covers only wrongful disclosure by 1<sup>st</sup> respondent of information disclosed to her by 1<sup>st</sup> appellant and not confidential information disclosed by 1<sup>st</sup> respondent, the receiving party, to the disclosing party, the 1<sup>st</sup> appellant, and to that extent, the arbitration clause will not apply...”**See also the case of **NIGERIAL.N.G LTD V A.D.I.C LTD (1995) 8 NWLR (PT 416) 677 @ 698.**

To that extent, the 3<sup>rd</sup> Defendant/Applicant not being a party to the PPA cannot ask or invoke the arbitration clause. I so hold.

For the avoidance of doubt, let me add that even those who are parties to the power purchase agreement i.e. 4<sup>th</sup> & 5<sup>th</sup> Defendants/ Respondents did not even file anything in defence of the suit despite being served with the originating processes as well as other court processes in this suit. This in my opinion suggests that parties to the PPA have willingly submits to the jurisdiction of the court. I so hold

In light of the above, this Preliminary Objection lacks merit and consequently, I hereby resolve the issue for determination in favour of the Claimant/ Respondent and against the 3<sup>rd</sup> Defendant/Applicant and

hold very strongly that this honourable court has unfettered jurisdiction to hear and determine this suit.

In the final analysis and without further ado this Preliminary Objection is hereby dismissed in its entirety. The matter is hereby adjourned for hearing of the substantive suit under the undefended list.

*Signed*

**HONORABLE JUSTICE S.U.BATURE**

**11/3/2021**