IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON THURSDAY, THE 30TH DAY OF SEPTEMBER, 2021
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/644/2021
MOTION NO.: M/4136/2021

BETWEEN:

CHIBUZOR OBIAJUNWA ESQ.
(TRADING UNDER THE NAME AND STYLE,
HOUSE OF LAW ATTORNEYS) **CLAIMANT/RESPONDENT**

AND

1. **MBA TRADING AND CAPITAL INVESTMENT LTD**
2. **MR. MAXWELL WELI CHIZI ODUM**
   (TRADING UNDER THE NAME AND STYLE,
   MEN IN BUSINESS THRIFT AND CREDIT
   COOPERATIVE LTD)
3. **DR. GLORIA CHINDA** **DEFENDANTS**
4. **UWECHI UCHENNA**
5. **PATIENCE DANIEL**
6. **EMMANUEL WEALTHY**
7. **IBE NKECHI MARTHA** **APPLICANT**
8. **MRS. VODINA WEST**
9. **WORLD CITIZEN EQUITY PARTNERS LTD**

RULING

This Ruling is on the competency of the suit of the Claimant/Respondent in view of the arbitration clause in the agreement between the Claimant/Respondent and the 1st Defendant and the joinder of the 7th Defendant/Applicant as a party to this suit.

By way of a Motion on Notice dated and filed on the 2nd of July, 2021, the 7th Defendant/Applicant seeks the following reliefs from this Honourable Court:-

1. An Order striking out this suit for want of jurisdiction to hear and entertain same.
2. And for further Order(s) as this Honourable Court may deem it fit to make in the circumstances of this suit.

In the affidavit which was deposed to by one Emmanuel Odu Onabe Esq., a legal practitioner in the law firm representing the 7th Defendant/Applicant, it was stated that the suit of the Claimant/Respondent was based on a contractual relationship between the Claimant/Respondent and the 1st Defendant. The Investment Contract Terms which was the evidence of this contractual relationship had an arbitration clause, Clause 24 which provided that efforts to resolve any dispute arising therefrom should begin with arbitration. It was further averred that despite this express stipulation, the Claimant/Respondent commenced the suit without, first, making any effort at arbitration.

In the written address in support of the application, the 7th Defendant/Applicant through her Counsel formulated a lone issue for this Court to consider, to wit: *"whether this Court has jurisdiction to entertain this suit as against the 7th Defendant"*. In his argument on the issue, learned Counsel contended that the 7th Defendant/Applicant was neither a proper party nor a necessary party to the action of the Claimant/Respondent. The contention of the Counsel for the 7th Defendant/Applicant flowed from his premises that the 7th Defendant/Applicant was a mere agent of a disclosed principal, and that the position of the law was that no liability attached to an agent of a disclosed principal.

Learned Counsel added that since that was the case, it was a misjoinder of parties to join the 7th Defendant/Applicant as a party to this present suit. He further submitted that a suit that had no proper parties was incompetent and that the incompetency was such as to rob the Court of jurisdiction to hear and determine the matter. In conclusion, he urged the Court to resolve the lone issue formulated in favour of the 7th Defendant/Applicant and strike out the suit of the Claimant/Respondent. In support of his submissions in respect of the sole issue formulated, learned Counsel cited and relied on ***Okafor v. Okafor (2000) FWLR (Pt. 1) 17; Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Ehidimhem v Musa (2000) FWLR (Pt. 21) 930; Amadiume v. Ibok (2006) All FWLR (Pt. 321) 1247 and Osigwe v. PSPLS MGT Consortium Ltd (2009) 3 NWLR (Pt. 1128) 178 at 399 – 400***.

Responding to the application of the 7th Defendant/Applicant, the Claimant/Respondent, on the 13th of July, 2021, filed a 5-paragraph Counter-Affidavit in opposition. In the counter-affidavit, the Claimant/Respondent who was the deponent thereto, averred that contrary to the provisions of paragraph 6 of the General Clause of the agreement between him and the 1st Defendant, the 1st Defendant did not notify him of any change of address, thereby raising the possibility the transaction was riddled with fraudulent intentions on the part of the Defendants. He added that the fraud has eclipsed the pre-condition of a resort to arbitration before the institution of an action in Court.

In his written address in support of the counter-affidavit learned Counsel adopted the issue formulated by the 7th Defendant/Applicant and proceeded to argue same. Pointing out that processes filed in the Court constituted records of the Court which the Court must take judicial notice of, Counsel argued that the facts deposed to in the affidavit in support of the substantive action disclosed

substantive cause of action against the 7th Defendant/Applicant who was sued in her personal capacity; as well as against the other persons or entities named in the suit as Defendants.

Describing the argument of the 7th Defendant/Applicant as misconceived, the Claimant/Respondent contended that one of the grounds for lifting the veil of incorporation was where fraud is disclosed. He maintained that lifting the veil of the 1st Defendant in this case disclosed the 7th Defendant/Applicant and other Defendants as the force behind the 1st Defendant. Pointing out that the standard of proof of fraud in this case was not proof beyond shadow of doubt but proof beyond reasonable doubt, the learned Counsel submitted that the facts of the case amply disclosed that the 7th Defendant/Applicant was an active participant in the actions that form the subject matter of this suit and, therefore, a necessary party to this suit.

He further asserted that where there was an allegation of a crime within a commercial contract, the aggrieved party was discharged from the obligation of abiding by the arbitration clause in the agreement. According to the Claimant/Respondent, it was significant to note that the 7th Defendant/Applicant was not praying the Court for an order to stay proceeding pending arbitration; but, rather, an order striking out the suit. He contended, therefore, the 7th Defendant/Applicant, having taken steps in respect of the suit, could be heard insisting on adherence to the arbitration clause in the agreement.

In view of his submissions in opposition, learned Counsel urged this Honourable Court to dismissed the application with substantive costs against the 7th Defendant/Applicant. In support of all his submissions, learned Counsel cited and relied on the following cases: ***Nabore Properties Ltd v. Peace-Cover Ltd***

(2015) 2 NWLR (Pt. 1443) 286; Executors, the Estate of Efejuku v. Aziza (2013) 11 NWLR (Pt. 1365) 307; Makon Engr. & Tech. Services v. Nwokedinkor (2020) 5 NWLR (Pt. 1716) 165; Afolayan v. Adimoha (2020) 1 NWLR (Pt. 1706) 558; Alade v. Alic (2010) 19 NWLR (Pt. 1226) 111; Rowaye v. FRN (2018) 18 NWLR (Pt. 1650) 21; Miller v. Minister of Pensions (1947) All E.R. 372; Lori v. State (1979 – 1981) 12 NSCC 269; Popoola v. State (2018) 10 NWLR (Pt. 1628) 485; NSCDC v. Oko (2020) 10 NWLR (Pt. 1732) 288; Uwazuronye v. Governor, Imo State (2013) 8 NWLR (Pt. 1355) 28; Danfulani v. EFCC (2016) 1 NWLR (Pt. 1493) 223; Felak Concepts Ltd v. A.-G. Akwa Ibom State (2019) 8 NWLR (Pt. 1675) 433; Obembe v. Wemabod Estates Ltd (1977) Vol. II NSCC 264; Enyedike v. Ogoloma (2008) 14 NWLR (Pt. 1107) 247 and Onward Enterprises v. MV "Matrix" (2010) 2 NWLR (Pt. 1179) 530.

The above is a synopsis of the arguments of Counsel for and against the application. In the determination of this application, and in consideration of the issues raised by both parties herein, this Court believes, and rightly so, that the following issue calls for determination:

"Whether this Honourable Court does not have the jurisdiction to hear and determine the suit of the Claimant/Respondent as presently constituted against the 7th Defendant/Applicant?"

In resolving this issue, I shall adopt a two-pronged approach. First, is the question of the enforceability of the arbitration clause in the Investment Agreement between the Claimant/Respondent and the 1st Defendant in this suit. The second is the problem of the propriety of the joinder of the 7th Defendant/Applicant in this suit.

With regards to the enforceability of an arbitration clause, it is trite that a Court, in the resolution of any dispute brought before it, has a duty to look at all the processes filed in any matter before it so as to do substantive justice in the matter. In the case of ***Nigerian German Chemicals Plc v. All Ray Maritime Services Ltd (2018) LPELR-50856***, the Court of Appeal per Yakubu JCA held that ***"the law remains well settled to the effect that the Court has the obligatory duty to consider all processes filed before it before it reaches a decision on the matter placed before it for determination between the parties."***In ***Matahor & Anor v Ibarakunye (2017) LPELR-43346 (CA)***, the Court of Appeal per Oniyangi, JCA held that ***"it is within the Court competence to look at all processes filed in a matter."***See also ***Ikpeazu v. Otti & Ors (2016) LPELR-4005 (SC)***. Though none of the parties in this application exhibited the Investment Agreement between the Claimant/Respondent and the 1st Defendant, the 7th Defendant/Applicant made reference to it when it drew the attention of this Court to the presence of an arbitration clause therein.

Designated as "Investment Contract Terms" and exhibited in the affidavit in support of the Originating Summons as **Exhibit HLA 2**, Clause 24 under the heading "Breach of Agreement" therein stipulates that "all disputes arising from this Agreement shall first be resolved through Arbitration under the Arbitration and Conciliation Act, CAP A18 LFN, 2004". No doubt, **Exhibit HLA 2** contains an arbitration clause.

An arbitration clause is a written consensus which embodies the agreement of parties to resort to arbitration should any dispute arise with regards to the obligations which both parties have undertaken to observe and that such dispute should be settled by a third party or tribunal of their own choice and

constitution. See ***BCC Tropical Nigeria Ltd v. The Government of Yobe State of Nigeria &Anor (2011) LPELR-9230 (CA) 13 paras D-F***. In the case of ***M. V. Lupex v. N. O. C. & S. Ltd (2003) 15 NWLR (Pt. 844) 469 at 487 paras A-B***, the apex Court defined arbitration as ***"a written submission agreed by the parties to the contract and, like other written submissions, it mustbe construed according to its language and in the light of the circumstances in which it is made."***

According to the 7th Defendant/Applicant, the suit of the Claimant/Respondent was incompetent for non-compliance with a condition precedent, to wit, recourse to arbitration first before institution of a proceeding in court upon failure of the arbitration. The Claimant/Respondent, on the other hand, contended that the fact the 1st Defendant was a vehicle for fraud extinguished the operability of the arbitration clause in **Exhibit HLA 2.**He also added that the 7th Defendant/Applicant, having taken steps in the proceedings, especially since her prayer was not for an order of the Court staying proceedings pending arbitration, should not be heard that the Claimant/Respondent ought to have gone to arbitration first before approaching the Court.

Ordinarily, disputes arising from agreements, or contracts that contain arbitration clauses are resolved through the mode of alternative dispute resolution agreed by the parties in their contract. This is in deference to the doctrine of *pacta sunt servanda*. The Courts must, at all times, give effect to the terms of the contract which define the rights and liabilities of the parties thereto as long as the contract is not illegal or fraudulent. See ***Sonnar (Nigeria) Ltd & Anor v. Partenreedri M.S. Nordwind Owners of the Ship M.V. Nordwind & Anor (1987) LPELR-3494 (SC) AT PP. 42 -43, PARAS d-b, PER Oputa JSC; Cheveron (Nig.) Ltd & Anor v. Brittania-U (Nig.) Ltd & Ors (2018) LPELR-***

43899 at pp. 75-78, paras C-E. See sections 2 and 5 of the Arbitration and Conciliation Act.The Civil ProcedureRules of the various Court have given further impetus to this judicial position. For instance, see, generally, Order 19 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018.

An arbitration clause affords the parties to a contract an opportunity to resolve a dispute arising from the contract through arbitration subject to such terms as they may agree to impose upon themselves.For a party to successfully move the Court to stay proceedings and refer the parties to arbitration pursuant to an arbitration clause in the contract, the party, before they take any step in the proceeding, must show to the satisfaction of the Court that there is, or, are, sufficient reason or reasons to refer the matter to arbitration in accordance with the arbitration agreement and that they were ***"at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings."*** See section 5(1) and (2) of the Arbitration and Conciliation Act.

It is not enough for the party seeking an order of the Court for stay of proceedings pending arbitration or, as in this case, an order striking out the suit for non-compliance with a condition precedent, to merely inform the Court of the stipulation in the contract as to reference to arbitration in the event of dispute arising from the contract. I have carefully perused the affidavit in support of the application. The 7th Defendant/Applicant has not adduced sufficient reasons the Court should refer the parties to arbitration. Particularly instructive in this regard is the relief she is seeking from this Court. The 7th Defendant/Applicant is asking for an order of the Court striking out the suit of the Claimant/Respondent for

want of jurisdiction. She is not praying the Court for an Order of Court staying proceedings pending arbitration. The latter is the apposite prayer to have made in the circumstance. It is abecedarian that the presence of an arbitration clause in a contract does not operate to oust the jurisdiction of the Court; it only delays resort to the Court and the grantability of the application is within the discretionary powers of the Court to which the application is made. Praying the Court to strike out the suit for want of jurisdiction does not come within the perimeters of section 5(1) and (2) of the Arbitration and Conciliation Act.There is a plethora of judicial authorities on this subject, but, I shall cite only a few: see ***Abdulkadir v. Saleh (2014) LPELR-24632 (CA) at pp. 23 – 28, paras B-B per Adefope-Okojie JCA; Hanover Trust Ltd v. Unique Ventures Capital Management Co. Ltd& Anor (2014) LPELR-23359 (CA) per Augie, JCA at pp. 47 – 49 paras B; Bill & Brothers Ltd & Ors v. Dantata & Sawoe Construction Co. (Nig.) Ltd & Ors (2015) LPELR-24770 (CA) at pp. 10-12 paras A-A per Ekanem JCA; Sacoil 281 (Nig.) Ltd & Anor v. Transnational Corporation of (Nig.) Plc (2020) LPELR-49761 (CA) at pp 61-62 paras C per Tobi JCA.***

Apart from the fact that to grant or not to grant an application for stay of proceedings pending arbitration is one which is at the discretion of the Court, there are instances where Courts must assume jurisdiction to hear and determine disputes arising from a contract even where the contract contains an arbitration clause. Such instances include situations where the party against whom the action is brought admits liability, or where there is no disputation as to liability; where the contract is severable; where the contract is null and void, where the contract is inoperative, where the contract is incapable of being performed and where fraud is alleged. See, generally, ***The Owners of the M. V.***

Lupex v. Nigerian Overseas Chartering and Shipping Limited (2003) LPELR-3195(SC).

In this case, one of the reliefs the Claimant/Respondent is seeking from this Honourable Court in this suit is a declaration that the Defendants' actions in respect of the subject matter of the substantive suit amount to deceit and conversion. It is my considered view, and I so hold, that this relief has extinguished the arbitration clause in the agreement and has placed this suit within the jurisdictional competency of this Court. The Court must, perforce, assume jurisdiction to determine whether, indeed, fraud has been committed in the course of performance of the contract.

Besides, the contract is between the Claimant/Respondent and the 1st Defendant. Under the doctrine of privity of contract, the general rule is that only parties to a contract can claim the benefits inherent therein or suffer the liability arising therefrom. This also entails that only parties to the contract can sue and be sued. In ***Cheveron (Nig.) Ltd & Anor v. Brittania-U (Nig.) Ltd & Ors (2018) LPELR-43899 at pp. 82-83, paras E-F***, the Court of Appeal per Ugo JCA held that persons who are not parties to an agreement cannot ask for arbitration on it. In ***Gamji Fertilizer Co. Ltdf & Anor v. France Appro S.A.S. & Ors (2016) LPELR-41245 (CA) at pp. 25-27, paras F-F***, the Court of Appeal per Adefope-Okojie JCA held that an arbitral clause can only bind the parties to the agreement entered into and not third parties. In ***African Insurance Development Corporation v. Nigeria Liquefied Natural Gas Limited (2000) 4 NWLR (Pt. 653) 494 at 504 para B-D***, the apex Court per Ayoola JSC, after an examination of section 5(1) of the Arbitration and Conciliation Act, held that ***"it is evidence from the provisions of section 5(1), that the applicant for a stay of proceedings must be a 'party to the arbitration agreement' and that***

the subject matter of the action must be 'with respect to any matter which is the subject of an arbitration agreement'"

The 7th Defendant/Respondent, even as an officer of the 1st Defendant, is not entitled to exercise the rights which inure to the parties in that Investment Agreement notwithstanding that she is sued as a party in this suit. The law, however, recognizes certain exceptions to the doctrine of privity of contract. The 2nd – 9th Defendants are named as parties because they are officials of the 1st Defendant pursuant to the Claimant/Respondent's bid to pierce the veil of incorporation of the 1st Defendant.

That brings me to the second arm of the issue which I have formulated herein, to wit, whether the 7th Defendant/Applicant is a proper and necessary party in this suit. The 7th Defendant/Applicant has contended *inter alia* that her joinder in this suit is a misjoinder since she is an agent of a disclosed principal. On the other hand, the Claimant/Respondent rationalized his inclusion of the 7th Defendant/Applicant as a party to this suit in paragraph 3(a) of his counter-affidavit to the Motion on Notice of the 7th Defendant/Applicant where he stated inter alia "…I entered the contract at the branch of the 1st Defendant managed by the 7th Defendant situate at Sticks and Stones Plaza, Wuse, Abuja." In paragraph 3(b), he stated further that "…the offices of the 1st Defendant are locked, and the 2nd to 8th Defendants are all in hiding."

I am not unaware of the position of the law that the agent of a disclosed principal cannot be held liable for the conduct of the principal regarding the principal's contractual relationship with third parties. This, however, does not apply to instances where the disclosed principal is a company acting through its officers and the circumstancesare such as to warrant the lifting of the veil of

incorporation to see the directing minds of the company. Considering the nature of the contestation in this suit, and the allegation of deceit and conversion contained in the originating summons, it is only proper, in the interest of fairness and justice, that the officers and/or directors be made parties to the suit. It is trite that a company acts through human agents, in this case, the directors or officers who are regarded as the directing mind of the company. This Court must, perforce, look beyond the veil of incorporation to see who constitute the directing mind of the 1st Defendant in order to determine the extent of their liability, if any.See, for instance, ***Marina Nominees Ltd v. FBIR (1986) LPELR-1839 (SC); Octopus Investments & Finance Co. Ltd v. Vaswani & Ors (2015) LPELR-25755 (CA); Egbor & Anor v. Ogbelor (2015) LPELR-24902 (CA); Tafida & Anor v. Garba (2013) LPELR-22076 (CA) and M. V. Long Island v. FRN (2018) LPELR-43479 (CA)*** among others.I have no difficulty in holding, and I so hold, that the 7th Defendant/Applicant is a necessary and proper party to this suit.

For all the reasons stated above, I have no hesitation in dismissing the application of the 7th Defendant/Applicant. The application is accordingly dismissed for lacking in merit.

This is the Ruling of this Court delivered today, the 30th of September, 2021.

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HON. JUSTICE A. H. MUSA
JUDGE
30/09/2021